Petition

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ALEXANDER

81-465

IN THE

SUPREME COURT OF THE UNITED STATES

TERM

No. _____

JAMES D. PORTER, FRANK L. BARANKA
and REGIS J. McCARTHY,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS FOR REVIEW

1. Whether the Commonwealth of Pennsylvania has standing in its capacity as parens patria to bring an action under 42 U.S.C. Sec. 1983 on behalf of individual citizens who claim their rights have been violated by a Police Officer of a Borough of the Commonwealth of Pennsylvania.

2. Whether the Commonwealth of Pennsylvania may bring an action as a representative of a class of individuals who claim violation of their constitutional rights as a result of misconduct by a Police Officer.

3. Whether the United States District Court in entering the injunction in this case improperly interfered with the statutorily prescribed governmental function of a municipality.

4. Whether the United States District Court granted injunctive relief which was overly broad and inappropriate in this case.

5. Whether the case has been rendered moot by the resignation of the Police Officer from the Borough Police Department.

6. Whether incidents occurring beyond the statute of limitations may be used as a basis for injunctive relief.

LISTING OF PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Commonwealth of Pennsylvania,Plaintiff
Richard W. Baumann,Plaintiff
Joseph Blume,Plaintiff
James Mages,Plaintiff
Bernard w. Peitz, Jr.,Plaintiff
James D. Porter, Chief of Police
Borough of Millvale,Defendant
and Petitioner
Frank L. Baranyai, Borough of Millvale
Police Officer,Defendant
and Petitioner
Regis J. McCarthy, Mayor of Borough of
Millvale,Defendant and Petitioner
Carl Seidl, President of Millvale Borough
Council,Defendant
Maurice P. Bedel, Sr.,,Defendant
James Beran,Defendant
John L. Cavanaugh,Defendant
Jerry Dawson,Defendant
James H. Lawson,Defendant
Stephen Mikus,Defendant

The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 480 F.Supp 686 (1979).

STATEMENT OF JURISDICTION

The judgment of the three judge panel of the Court of Appeal for the Third Circuit was entered on February 19, 1981. This panel decision was vacated and a rehearing en banc was granted on March 26, 1981. The Order of the United States Court of Appeals for the Third Circuit sitting en banc affirming in part and reversing in part the decision of the United States District Court was filed on July 30, 1981 and a copy of the Opinion of the Court en banc is attached hereto and marked Exhibit "A". A copy of the Opinion of the three judge panel of the Court of Appeals is attached hereto and marked Exhibit "B" and a copy of the Findings of Fact and Opinion of the United States District Court for the Western District of Pennsyvlania is attached hereto and marked as Exhibit "C".

The jurisdiction of this court is envoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

42 U.S.C. Sec. 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

HISTORY OF CASE

The Commonwealth of Pennsylvania commenced an action by Complaint on October 5, 1977 seeking injunctive relief against the Petitioners Frank L. Baranyai, James D. Porter, and the Mayor of the Borough of Millvale, among others,

allegedly as a result of police misconduct by Frank L. Baranyai a Police Officer of the Borough of Millvale. The defendants responded with a Motion to Dismiss which was granted by the United States District Court for the Western District of Pennsylvania on March 3, 1978 with the proviso that if within twenty (20) days from the date of the Order individual citizens, who had suffered deprivations of their rights as alleged in the Complaint, joined with the Commonwealth as party-plaintiffs, then the Motion to Dismiss would be denied. An Amended Complaint was then filed with Richard Baumann, Joseph Blume, James Mages and Bernard Peitz, Jr., joining the Commonwealth as parties plaintiff. The defendants again filed a Motion to Dismiss which was denied by Order dated May 2, 1978. The Court provided that a

class action question would be deferred until the plaintiffs filed a Motion for Determination of a Class. On June 22, 1978 plaintiffs Baumann, Mages, Blume and Peitz filed a Motion for Determination of a Class which was denied by the District Court. The Court stated that it felt that the Commonwealth as parens patriae could represent all members of the class. Following a non jury trial the court entered an order en joining the defendants from conduct enumerated within the Order. The defendants then appealed to the United States Court of Appeals for the Third Circuit and an Opinion was filed by a three judge panel a copy of which is attached hereto an marked Exhibit "B". The panel of the Court of Appeals held that the Commonwealth was not a party-plaintiff and reversed and remanded.

Upon petition of the plaintiffs the Court of Appeals granted a rehearing en banc. A divided court affirmed the judgment of the District Court with respect to the Petitioners, but dismissed the plaintiffs action as to members of the Millvale Borough of Council. The Order of the Circuit Court was dated July 30, 1981.

The plaintiffs claim jurisdiction under 28 U.S.C. Sec. 1343.

Jurisdiction of the United States District Court was sought by the plaintiffs under 28 U.S.C. Sec. 1343.

ARGUMENT

This is an action brought against the defendants based upon alleged unconstitutional conduct by a police officer of the Borough of Millvale with respect to fifteen individuals. The

action was originally brought by the Commonwealth asserting that it was acting as parens patriae and as a respresentative of the citizens of the Borough of Millvale and any persons who may be in Millvale in the future. The plaintiff's original Complaint was dismissed on the basis that none of the individuals whose rights were affected with were parties plaintiff to the suit. Subsequently, four individuals joined as parties plaintiff and the case proceeded. The plaintiffs then sought certification of a class. Plaintiff's request was denied by the court with the court stating that the individual citizens would be adequately represented by the Commonwealth as "parens patriae". The status of the Commonwealth as a party-plaintiff was challenged throughout the proceedings by all of the defendants,

rights, there is no injury to the State's sovereign or quasi sovereign interest. See Pennsylvania v. New Jersey, 426 U.S. 660 (1976); Commonwealth, ex rel Rafferty v. Philadelphia Psychiatric Center, 356 F.Supp. 500 (1973).

The court refused to certify the claims of the individual plaintiffs as a class action. The defendants resisted the certification of the class on the grounds that the class was too vague and indefinite to properly proceed under Federal Rule of Civil Procedure 23, that in the alternative that if the class were confined to those persons listed in the plaintiffs' Complaint the numerosity requirement of the Rule would not be satisfied, that there were no common questions of law or fact common to the class, that the representatives were not truly representatives of the class and

as was the status of the individual plaintiffs to bring the action on behalf of other persons.

While the capacity of a State to bring an action as "parens patriae" is an old and well recognized doctrine, its right "encompasses suits either brought to protect its proprietary interest or brought to protect quasi soverign interests such as health, comfort and welfare of its citizens or of the genearl economy of the State." Commomwealth of Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11 (3rd Cir.1975).

> "A quasi sovereign' interest must be an interest of the State existing separate and apart from those injuries suffered individually by the State citizens. [Citation Omitted]. What must be at stake is the State's independent interest, which generally arises from either (1) the State itself having suffered injury, such as direct damage to its economy, [Citation Omitted] or (2) the general public having suffered an injury so that no one individual has legal standing to sue [Citation

Omitted]. Under either circumstances, the sine quanon for the State which sues in its (patria) capacity, is that damage has occurred to its interest apart from the interest of particular individuals who may have been affected." Commonwealth v. National Association of Flood Insurers, supra.

Implied in the flood case is that the Commonwealth must have some injury separate and distinct from that of the individuals it may represent.

There has been absolutely no showing of injury to any sovereign interest separate and distinct and apart from those of the individuals.

In the present case, the sole issue before the court is the allegation of the violation of the rights of fifteen persons enumerated in the lower court's finding of fact. These incidents were all distinct isolated situations and do not effect a substantial number of the citizens of the Commonwealth or for that matter of the Borough of Millvale. Further, assuming arguendo a violation of individual citizen's constitutional

that the prosecution of separate actions by members of the class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, that the plaintiffs did not allege conduct of the defendants in any one incident which is common to the other incidents, that questions of law or fact common to the members of the class do not predominate over any questions affecting only individual members, and that a class action is not superior to other available methods. In refusing to certify the class, the court merely stated that the Commonwealth was an adequate representative of the other parties and the case proceeded with the class being defined as the citizens of the Commonwealth including the residents of

the Borough of Millvale and all others who may lawfully reside in Millvale or may in the future be in Millvale said definition being provided after trial in the court's finding of fact No. 3. Further, the court found in Finding of Fact No. 4, that the individual plaintiffs bring the action on their own behalf and on behalf of all persons residing in or otherwise lawfully in the Borough of Millvale and all persons who will in the future reside in or lawfully be in the Borough of Millvale, when in fact such class had never been certified and should not be certified for the reasons set forth above.

A further buttress to the argument that the Commonwealth is not a proper party representative can be found in the Commonwealth's Petition to the Court of Appeals asking to withdraw the argument that it is a "person" as the

term is/used in 42 U.S.C. Sec. 1983. As stated in Judge Garth concurring in part and dissenting apart Opinion, "The panel of this court was correct in holding that the Comonwealth is not a person within the terms of Section 1983." "In so conceding, the Commonwealth apparently recongized that the State itself cannot seek the protection of 1983 with respect to its own sovereign interests" (Garth, J. Opinion page 42 and 43; Footnote #3 of said Garth, J. Opinion)

As the injunction presently stands against the Chief of Police and the Mayor of the Borough of Millvale it constitutes a Federal instrusion in the governmental affairs of a local municipality beyond the boundaries set by this court in Rizzo v. Goode, 423 U.S. 362 (1976) and the Court of Appeals has therefore decided a Federal question in a way in conflict with applicable decisions

of this court. The injunction presently prohibits Officer Baranyai from serving as a Police Officer in the Borough of Millvale. This extraordinary Order deprives an individual of his livelihood and is beyond the civil relief contemplated under 42 U.S.C. 1983. No Appellate decision has gone to such extremes and it is submitted that the Court of Appeals, in condoning such an action, has decided an important question of Federal law which has not been, but should be, settled by this Court.

After the decision of the U.S. District Court was appealed, but before the argument en banc, Officer Baranyai resigned as a Police Officer for the Borough of Millvale and this fact was recognized by the U.S. Court of Appeals. It is submitted by the Petitioners that the case, prior to the decision of the U.S. Court of Appeals, had been rendered moot.

The United States District Court and the United States Court of Appeals both erroneously took into consideration incidents which had occurred beyond the statute of limitations as a basis for the issuance of the injunction. In fact the claim of one of the parties-plaintiff was barred by the applicable statute of limitations.

CONCLUSION

Because of the significant and unprecedented departure by the Court of Appeals from established law and the presence of important questions of Federal law which should be settled by this Court, this Court should grant this Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2653, 79-2684 and 79-2685

COMMONWEALTH OF PENNSYLVANIA and RICHARD W. BAUMANN, JOSEPH BLUME, JAMES MAGES and BERNARD W. PEITZ, JR., Individually and on behalf of all others similarly situated

v.

JAMES D. PORTER, Chief of Police; Borough of Millvale; FRANK L. BARANYAI, Borough of Millvale Police Officer; REGIS J. McCARTHY, Mayor of the Borough of Millvale, CARL SEIDL, President of the Millvale Borough Council; MAURICE P. BEDEL, SR., JAMES BERAN, JOHN L. CAVANAUGH, JERRY DAWSON, JAMES H. LAWSON and STEPHEN MIKUS, Members of the Millvale Borough Council,

Frank L. Baranyai, *Appellant* in No. 79-2653
Regis J. McCarthy, et al., *Appellants* in No. 79-2684
James D. Porter, *Appellant* in No. 79-2685

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 77-1164)

Argued October 6, 1980

Before: ALDISERT, GARTH and VAN DUSEN,
Circuit Judges

Exhibit "A"

Reargued In Banc May 12, 1981

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER GARTH,
HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Filed July 30, 1981)

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OPINION OF THE COURT

PER CURIAM, announcing the judgment of the court:

To the extent the injunction of the district court is directed to the members of the Borough Council it will be reversed. In all other respects the judgment of the

district court will be affirmed. Because neither appended opinion commands in its entirety a majority of the members of the court, their positions are noted as follows:

Judges Higginbotham and Sloviter join in Judge Gibbons' opinion in its entirety.

Chief Judge Seitz, and Judge Adams, because of the unusual factual situation present here, join in the conclusions reached in Judge Gibbons' opinion except as to part IV(D) dealing with the Borough Council. As to the Borough Council, they join in the conclusion reached in part IV of Judge Garth's opinion.

Judges Aldisert and Hunter join in Judge Garth's opinion in its entirety.

Costs to be taxed against Appellant Baranyai in No. 79-2653.

One-half the costs to be taxed against the Appellees and one-half the costs to be taxed against Appellant McCarthy in No. 79-2684.

Costs to be taxed against Appellant Porter in No. 79-2685.

GIBBONS, *Circuit Judge*, with whom Judges Higginbotham and Sloviter join fully, and with whom Judges Seitz and Adams join except for Part IV D.

Frank L. Baranyai, a policeman, Regis J. McCarthy, Mayor, James D. Porter, Police Chief, Carl Seidl, President of the Borough Council, and six other council members, all of the Borough of Millvale, Pennsylvania appeal from a final injunction issued in an action brought by the Commonwealth of Pennsylvania and three individual plaintiffs, charging that Baranyai, with the instigation, acquiescence and ratification of the Mayor and Council, engaged in an extended pattern or practice of conduct denying persons lawfully in Millvale their constitutional rights to be free from physical violence, mistreatment, threats, harassment, illegal deten-

tion, illegal arrests, and illegal searches and seizures. Each defendant, for different reasons, contends that no injunctive relief should have been granted against him.

I

The Borough of Millvale is a small municipality in Allegheny County organized under the Pennsylvania Borough Code. 53 P.S. §45101 et seq. That code vests in the Borough Council power to enact ordinances not inconsistent with the laws of the Commonwealth. 53 P.S. 46006(3). The Code also provides that it shall be the duty of the Mayor "[t]o preserve order in the borough, to enforce the ordinances . . . [and] to exact a faithful performance of the duties of the officers appointed . . . ." 53 P.S. 46029(1). Borough Councils are authorized "to appoint and remove, or suspend, or reduce in rank, one or more suitable persons . . . as borough policemen." 53 P.S. 46121. Moreover "[t]he borough council may designate one of said policemen as chief of police." *Id.* The Mayor of the Borough "shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties . . . ." *Id.* While Section 46121 vests ultimate power of removal or suspension of policemen in the Borough Council, the Mayor may suspend any policeman for cause until the Council's next regular meeting. 53 P.S. §46124. Thus the Mayor of a Pennsylvania borough is its chief law enforcement officer, charged with the responsibility of supervising the manner in which the police department functions, with ample authority to control the conduct both of the chief of police and of all police officers. Together, the Mayor and the Council exercise close control over Borough Police Force personnel.

53 P.S. §46190 lists specific reasons for suspension or removal of policemen. Among those reasons are "vio-

lation of any official duty", besides the commission of a misdemeanor or a felony, "inefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer." Anyone acting in an official capacity in Pennsylvania, including a policeman, commits a misdemeanor if, knowing his conduct is illegal, he subjects another to arrest, detention, search, seizure, mistreatment or other infringement of personal or property rights; or denies or impedes another in the exercise of any right, privilege, power or immunity. 18 C.P.S.A. §5301.

In 1911, the Borough of Millvale passed an ordinance, No. 305, never amended nor repealed, defining disorderly conduct. (Joint Exhibit B). Disorderly persons include "[a]ll persons persisting in loitering upon the public highway or streetcorners and in front of any store, shops, places of business, place of amusement or place of worship after being requested to vacate such place or places and move on," "[a]ll habitual street or corner loafers," and "[a]ll suspicious persons or person who can give no reasonable account of themselves."

In the summer of 1973 the Council hired Baranyai as a policeman. In August of 1974 the Council at a meeting attended by the Mayor, received the first of a long series of citizen complaints about Officer Baranyai's behavior in that capacity. On that occasion three persons complained of verbal abuse or harassment. (Plaintiff's Exhibit 1). Subsequent complaints of more serious misconduct by Baranyai were made, and these eventually came to the attention of Community Advocate Unit of the Attorney General's office in Pennsylvania. That office conducted an investigation which resulted in the filing of criminal charges against Baranyai in the Court of Common Pleas of Allegheny County on July 14, and July 18, 1977. Those charges were called to the attention of the Council, the Mayor, and the Chief of Police, but Baranyai, nevertheless, was continued as a policeman

dealing with the public. Indeed, after it learned of the Commonwealth's decision, the Council passed a resolution supporting Baranyai's conduct.[1]

On October 6, 1977 the Community Advocate Unit of the Attorney General's Office filed the complaint in this action, seeking preliminary and permanent injunctive relief prohibiting the defendants from subjecting residents of Millvale and others lawfully in Millvale from unconstitutional physical violence, mistreatment, threats, or harassment; from unconstitutional detention, searches, seizures, arrests and imprisonment; and from interference with the free exercise of their rights. The complaint alleges a course of conduct by Baranyai in violation of rights protected by the United States Constitution. It charges Baranyai with illegal arrests, illegal searches and seizures, excessive use of force, beatings of persons in custody, and intimidation of persons who would complain or testify against him. It alleges that the Council members, the Mayor and the Chief of Police, each of whom could exercise control over Baranyai, having full knowledge of this course of conduct, and of the danger he posed to all with whom he comes in contact during the course of his employment as a policeman, purposefully, unreasonably, and in bad faith refused to suspend, transfer, or otherwise limit his activities; publicly condoned and approved his unconstitutional actions; and in some instances intimidated or attempted to intimidate persons who would testify or complain against him.

The defendants responded to the complaint by filing a motion to dismiss. They pressed two principal grounds in support of that motion: (1) that the Commonwealth of Pennsylvania was not a proper plaintiff; and (2) that on

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1. Similarly, within a week of Baranyai's Feb. 8, 1978 conviction of simple assault and official oppression in Allegheny County Court of Common Pleas, the Council, on Feb. 14, passed another resolution supporting Baranyai.

the authority of *Rizzo v. Goode*, 423 U.S. 362 (1976) the complaint failed to state a claim upon which any injunctive relief could be granted. On February 24, 1978 the district court denied the motion unconditionally insofar as it relied on *Rizzo v. Goode*. The court also denied it insofar as it contested the Commonwealth's standing as a plaintiff, provided that within 20 days the Commonwealth filed an amended complaint joining as plaintiffs individuals whose rights are claimed to have been violated. An amended complaint was filed in which four individual plaintiffs were joined, and requested class action relief. The defendants responded to the amended complaint by a motion to strike, this time contending that all persons whose rights were violated would have to be joined, that the Commonwealth could not act on behalf of non-party victims of Baranyai's actions, that the four individual plaintiffs had an adequate remedy at law, and that a class action was improper. The motion to strike was denied. Thereafter the individual plaintiffs moved for a class action certification.
This motion was denied:

> for the reason that the Commonwealth of Pennsylvania as *parens patriae* is representing the citizens of the State generally in this action and if there is further need for class action which may later appear in this case plaintiff's [sic] may move at that time for reconsideration of the same.

Order of September 6, 1978, 2528a. *See also, Commonwealth of Pa. v. Porter*, 480 F. Supp. 686, 695 (W.D. Pa. 1979).

A non-jury trial of the action began on April 23, 1979. The court heard testimony from 61 witnesses over 14 days, and received in evidence voluminous exhibits. The trial court made extensive findings of fact, many of which involved credibility determinations about disputes in testimony between the witnesses offered by the plaintiffs and those offered by the defendants. The court's ul-

timate conclusion, based upon those extensive findings, is that "Baranyai has engaged in a pattern of [sic] practice denying citizens residing in and otherwise lawfully in the Borough of Millvale, Allegheny County, their rights to be free from physical violence, mistreatment, threats, harassment, illegal detention, illegal arrest and illegal searches and seizures."[2] As to the Chief of Police, the court found:

> The evidence indicates that despite complaints Porter never found fault with Baranyai pertaining to the charges. He took no action to discipline him after he was convicted in criminal court of malfeasance in office, he has publicly supported Baranyai in all instances, he could not give a single instance of a report of an investigation to the complainant, and he retaliated against other officers, viz: Cepek, Fisinger, Pfeifer and Snyder who testified or otherwise complained relative to Baranyai's conduct.[3]

As to the Mayor, the court found:

> The evidence in the case is that Mayor McCarthy instigated the police department in using broad powers under Ordinance No. 305 of 1911 to move people off the street who were doing nothing and not obstructing passage and to arrest them upon failure to move at the officer's whim . . . . Mayor McCarthy was in receipt of numerous complaints relative to Baranyai's conduct both in and outside council meetings but he found that all complaints were unjustified. Any investigation made was, as previously found by this court, perfunctory in nature only and consisted of asking Chief Porter or Officer Baranyai whether there was any basis for the complaint.

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2. Commonwealth of Pa. v. Porter, 480 F. Supp. 686, 692 (W.D. Pa. 1979).

3. 480 F. Supp. at 701.

> Mayor McCarthy has publicly stated that: "As long as I am Mayor, I will not suspend Frank Baranyai from the Millvale Police Force." He also participated in the retaliation against other officers who testified or complained relative to Baranyai. We therefore find that he is causally linked to this pervasive pattern of violation of constitutional rights and is subject to relief under *Rizzo v. Good[e]*, *supra*, that he is causally linked to police abuse and that practices in this case certainly rise to a custom or usage which is actionable under 42 U.S.C. §1983.[4]

As to the Council the court found:

> . . . the evidence shows that citizens soon learned that complaints to the Borough Council were useless. The Borough Council itself has, however, taken an active part in the Baranyai affair. It twice adopted resolutions supporting Baranyai's conduct on July 12, 1977 (Plaintiff's Ex. 15) and on February 14, 1978 (Plaintiff's Ex. 12).
>
> Notwithstanding that Baranyai was convicted on criminal charges against him and this case was filed on October 5, 1977, the Borough Council has nevertheless refused to take further action. Two members of the Borough Council who endeavored to induce it to do something about the situation and exercise its powers were voted down by a vote of 5 to 2 and were subject to personal abuse.
>
> . . .
>
> Beginning in 1975, the Borough Council began to get complaints about the conduct of Officer Baranyai and notwithstanding the verdict of guilty in the criminal cases and the bringing of this suit

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4. 480 F. Supp. at 702.

> has failed to make any investigation or take any steps toward removing or suspending him. This is not a case like *Rizzo* depending on statistical proof. The proof here pinpoints violations by one police officer against individual citizens who have appeared on the stand and complained. The police officer is a defendant here as well as the other borough officials who are involved in this unhappy proceeding and whose actions have encouraged Baranyai in further violations . . . We find this course of conduct on the part of Baranyai encouraged and supported by the other defendants in this case will continue unless some restraint is exercised by the court.[5]

Summarizing, the Court said:

> Under these circumstances we have no hesitation in finding that all the defendants in this case were causally linked to the police abuse by Officer Baranyai, that there was a pervasive pattern of support for him and his misconduct and this amounts to a custom and usage under 42 U.S.C. §1983 and *Monell, supra.*[6]

The court entered a permanent injunction the relevant provisions of which are set forth in the margin.[7] This appeal followed.

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5. 480 F. Supp. at 702-03.

6. 480 F. Supp. at 703.

7. (1) A permanent injunction is hereby issued against the defendant Frank L. Baranyai and all persons acting in concert with him enjoining him from (a) stopping, arresting or imprisoning plaintiffs or other individuals without adequate probable cause, (b) physically abusing or otherwise treating plaintiffs or other individuals, (c) using wrongful or excessive force while bringing about lawful arrests or in otherwise handling individuals arrested after they have been secured in custody.

(2) The defendant Baranyai together with the defendants James D. Porter, Chief of Police and Regis J. McCarthy, Mayor

II

The defendants have advised us that while the appeal was pending Baranyai left the employ of the Borough of Millvale, taking a job as a policeman in another

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NOTE — *(Continued)*

of the Borough of Millvale, Allegheny County are enjoined and restrained from harassing, threatening, intimidating or retaliating against the plaintiffs or other individuals in violation of their First and Fourteenth Amendment rights of speech assembly and association and their right to equal protection of the laws and their constitutional right to travel for lawfully complaining against the conduct of defendant Baranyai or testifying at trials or hearings involving his conduct.

(3) The defendant Baranyai is restrained from stopping, seizing and searching plaintiffs or other individuals on the streets whether in the Borough of Millvale or elsewhere, in their homes or otherwise without adequate cause in violation of their First and Fourteenth Amendment rights and to freedom from unreasonable searches and seizures and in violation of their rights not to be deprived of property without due process of law.

(4) All of the defendants are enjoined from further engaging in conduct as enjoined above or from encouraging, affirming, or participating in violations of this injunction by Baranyai.

(5) All of the defendants are hereby enjoined effective 5 days from the date of this order from employing defendant Baranyai and Baranyai is enjoined from serving as a police officer or law enforcement official on any basis in the Borough of Millvale except as a desk policeman whose activities shall be entirely confined to the police station of the Borough of Millvale and he is further enjoined from possessing or using upon prisoners or other persons any weapons of any kind, particularly without limiting the generality of the foregoing any blackjack, nightstick, firearm of any kind, brass knuckles or any other offensive weapon so that his activities with the Millvale Police Force shall be entirely confined to desk duty and in the course of such duty he shall not be permitted to use any weapons of any kind upon prisoners or other persons.

(6) The court will retain jurisdiction of this case for the purpose of issuing further orders to insure that the requirements of this order are carried out.

2574a-76a.

Pennsylvania community. They suggest that this development renders the entire case moot, and requires that we enter a judgment vacating the district court's judgment.[8] The Commonwealth disagrees. It points out that Baranyai is still functioning as a policeman, and that the pattern or practice of police misconduct which the court found he had engaged in may, if not enjoined, continue in another part of Pennsylvania. The Commonwealth is as interested in preventing police misconduct throughout Pennsylvania as in Millvale. Moreover the Commonwealth urges that the case involves not only Baranyai's abuses, but also the encouragement of those abuses by the Mayor, the Police Chief, and the Borough Council. For example, it cannot be said with certainty that those defendants will not in the future encourage the same misuse of ordinance No. 305 in which the court found they encouraged Baranyai. Finally, the Commonwealth points out that we have no assurance that absent the injunction Baranyai himself would not be rehired. In these circumstances we cannot say with assurance that there is no reasonable expectation that the alleged violations will recur, or that Baranyai's change in position has completely and irrevocably eradicated the effects of the pattern or practice the court found. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This is not a case like *DeFunis v. Odegaard*, 416 U.S. 312 (1974) in which the interest of a single plaintiff is involved and he has achieved everything a judgment could afford him. Nor is it a case in which we are reviewing a preliminary judgment which by standards applicable to pendente lite relief might be moot. *University of Texas v. Camenisch*, —— U.S. ——, 49 U.S.L.W. 4468 (No. 80-317 April 29, 1981). We review a final injunction protecting a broad class. The merits of that final injunction must be considered.

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8. *See* Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

III

All of the defendants contend that the trial court erred in refusing to dismiss the Commonwealth as a plaintiff. At first blush one may wonder why, since there are individual plaintiffs in the case in any event, so much time, effort and space has been devoted to this issue. What the defendants are seeking, however, is a result which will, without reaching the merits of most of the case, bring about an effective dismantling of the injunction. They argue that the individual plaintiffs were not designated as class representatives, and thus that any injunction could only run to plaintiffs' individual benefit, not to the benefit of others who in the future may happen to encounter Officer Baranyai, the Millvale police department, and other Millvale municipal officials. Thus, the defendants hope, our review will be confined to evidence of Baranyai's actions regarding the four named plaintiffs, and of support, encouragement or ratification by the remaining defendants in those specific instances. Even if we should reject defendants' challenge to the sufficiency of the evidence respecting the four named plaintiffs, defendants would have us direct the modification of the decree so that it protects only those plaintiffs, while Baranyai, the Mayor, the Chief of Police and the Council remain free of the threat of contempt in their dealings with other persons. They would, of course, be bound, by virtue of non-mutual collateral estoppel, by the determination that certain of their conduct is unconstitutional. Enforcement of the decree on a collateral estoppel basis would, however, require a plenary suit by a new plaintiff. Moreover, even if a more general injunction were authorized, the defendants could hope that policing its enforcement in the future would be less effective without the resources of the Commonwealth.

We are not impressed by the procedural subtleties to which we are asked to resort for the purpose of dis-

mantling the injunction. The individual plaintiffs sought and the defendants successfully opposed class action certification. Before we could accept the position that absent the Commonwealth as a plaintiff, the decrees must be dismantled because of the absence of class certification, we would have to consider whether in what is plainly a Rule 23(b)(2) type action, any prejudice resulted to the defendants from the failure to make such a certification. None has been called to our attention. Moreover we would also have to consider whether, assuming the Commonwealth should have been dismissed, the court erred in yielding to the defendants' opposition to class certification. Certainly it comes with little grace for the defendants to urge as a ground for reversal the very absence of class action certification which they insisted upon in the trial court. We need not, however, explore these engaging possibilities. They arise only if we accept the defendants' basic premise that the Commonwealth is an improper plaintiff. We do not.

At the outset, a straw man at which there has been a good deal of tilting can be set to one side. That is the question whether the Commonwealth is a "person within the jurisdiction" of the United States within the meaning of 42 U.S.C. §1983, or a "person" whose life, liberty or property is protected by Section 1 of the fourteenth amendment. The fourteenth amendment is a limitation upon the states in the interest of individuals, and section 1983 was enacted to facilitate vindication of such individual interests.[9] The question is not whether either the fourteenth amendment or section 1983 protects the Commonwealth — neither does[10] — but

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9. Perhaps a state, as a corporate entity owning property, is protected by Fifth amendment against the federal government's deprivations of that property without due process.

10. *See* United States v. City of Philadelphia, 644 F.2d 187, 227 (3d Cir. 1981) (Gibbons, J., dissenting from denial of rehearing en banc).

whether the Commonwealth is an appropriate plaintiff in an action seeking to prevent the infliction of constitutional violations on the persons the amendment and the statute do protect. If the Commonwealth is an appropriate plaintiff, there is subject matter jurisdiction in the district court, without regard to jurisdictional amount, under Federal Question Jurisdictional Amendments, Act of Dec. 1, 1980, Pub. L. 96-486, §2(a)(b), 94 Stat 2369, *amending*, 28 U.S.C. §1331, since that statute applies to any civil action pending on December 1, 1980. *See* 28 U.S.C. §1653. Thus we need not concern ourselves with the now obsolete question whether the Commonwealth could qualify as a plaintiff under 28 U.S.C. §1343(3). The sole question is whether it is an appropriate plaintiff. The Commonwealth urges that it is suing as parens patriae both in its own behalf as a sovereign and as a representative plaintiff on behalf of persons in Millvale and elsewhere in Pennsylvania.

In considering the Commonwealth's sovereign interests, it is well to start with an occasionally neglected fundamental. The fourteenth amendment is the supreme law of the land in all of Pennsylvania. All executive officers of Pennsylvania, including the Attorney General, have taken the oath prescribed by Article IV, Section 6, Clause 3 to uphold that amendment. *See* 71 P.S. §761; Pa. Const. Art. 6 §3. By virtue of the supremacy clause, the Commonwealth has the same interest in compliance with the standard of conduct laid down in the fourteenth amendment as it has in compliance with standards of conduct enacted by the Pennsylvania legislature. The Commonwealth is vitally interested in the prevention of lawless exercises of the powers its laws confer upon police officers hired by its subdivisions. Moreover, the Commonwealth is, with respect to local government, a total sovereign which has delegated limited functions to entities such as the Borough of Millvale. *See, e.g., In re Gagliardi's Appeal*, 163 A.2d 418 (Pa.

1960); *Golding v. Tp. of New Britain*, 382 A.2d 509 (Pa. Cmwlth. 1978). Misconduct of local government officials both interferes with the proper discharge of those functions which the Commonwealth has delegated, and risks undermining public confidence in the instrumentalities to which it made the delegation. Additionally, patterns or practices of misconduct by local officials in violation of constitutional rights interferes with the performance of the obligation of executive officers of the Commonwealth to uphold and enforce those rights. If those executive officers cannot take steps to prevent the future occurrence of such violations by injunction, a burden of post-event enforcement by investigation and prosecution will be imposed upon the Commonwealth, which will divert its resources of staff and money from other tasks. The Commonwealth is also vitally interested in safeguarding the health and safety of individuals in its territory.[11] The Commonwealth's interest in prevention of physical abuse which may cause serious personal injury is no different in kind from the Commonwealth's interest in preventing poisoning by toxic waste or maiming by unsafe automobiles. In each instance the cost, ultimately, is born by the Commonwealth. Finally, failure to prevent future occurrences of violations of constitutional

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11. *Cf.* Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (original jurisdiction) (suit to enjoin West Virginia from cutting off supply of natural gas to Pennsylvania. Natural gas consumers "constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.").

rights undermines the fiscal status of the Commonwealth's municipal creatures by exposing them to liabilities which can only be satisfied from tax revenues.[12]

In Pennsylvania, the Attorney General is the officer responsible for vindicating the sovereign interests referred to in the preceding paragraph. 71 P.S. §§244, 294(b), *repealed,* Commonwealth Attorneys Act of Oct. 15, 1980 No. 1980-164 (effective Jan. 20, 1981), *replaced with, id* §§201(a), 204(c). During oral argument before the full court the Deputy Attorney General representing the Commonwealth pointed to several reasons why, in vindicating them, it should not be forced to rely upon the happenstance of suits by individual victims of constitutional violations. First, many individual victims may be unable to show the likelihood of future violations of *their* rights, and will be relegated to damage actions only. Typical of such a potential victim is the one-time visitor to Millvale. Second, the burden of going forward with investigation and litigation of any action seeking injunctive relief against a pattern or practice of police misconduct is substantial, and is not likely to be within the resources available to the typical victims of such misconduct. Absent such resources an individual plaintiff may not be recognized by the court as an adequate class representative even if willing to sue. *See generally* Kaye & Sinex, *The Financial Aspect of Adequate Representation Under Rule 23(a)(4): A Prerequisite To Class Certification?*, 31 U. Miami L. Rev. 651 (1977). Thus, reliance on private enforcement is not likely to vindicate the Commonwealth's interests. Finally, in police misconduct cases the very real fear of intimidation and retribution is a significant deterrent to vigorous private enforcement

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12. Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Services, 436 U.S. 658 (1978).

actions.[13] Without the support of law enforcement at the state level, the Commonwealth could not anticipate that individual plaintiffs would have exposed themselves to that risk in order to vindicate the interests of the public.

Summarizing, then, the Commonwealth is in this suit advancing significant sovereign interests of its own in the prevention of future violations of constitutional rights of its citizens, in circumstances in which it cannot reasonably anticipate that private enforcement will achieve the protection of those sovereign interests. Any description of a parens patriae remedy, even the narrowest, includes the state of facts alleged in the Commonwealth's complaint.

Actions by a government for the prevention of harm to interests shared by all members of the community are no strangers to the federal law of remedies. The United States has been a frequent parens patriae plaintiff. *In re Debs*, 158 U.S. 564 (1895); *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La. (4 Judge Court), *aff'd per curiam*, 371 U.S. 10 (1962); *Fla-East Coast Ry v. United States*, 348 F.2d 682 (5th Cir. 1965); *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963); *United States v. Original Knights of the KKK*, 250 F. Supp. 330 (E.D. La. 1965) (3 judge court); *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970); *United States v. City of Shreveport*, 210 F. Supp. 36 (W.D. La. 1962); *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961). In all these cases the United States sued in a

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13. There is substantial evidence in the record in this case suggesting that such a fear was not baseless. See district court fact findings 35 & 36, 480 F. Supp. at 691 (Baranyai filed criminal charges of barratry and harassment against Commonwealth's Deputy Attorney General two days after the latter filed this civil action; during trial in this case, Baranyai harassed and intimidated Commonwealth witnesses in courthouse hallway).

to enjoin burdens upon interstate commerce.[14] Most involved burdens imposed by local law or custom, and which resulted in the violation of federal civil rights. Often such suits are authorized by federal statute such as 28 U.S.C. §518(b). *See United States v. California*, 332 U.S. 19, 27 (1946). The presence or absence of an authorizing statute, however, bears not on the standing of the United States, an Article III issue, but on federal separation of powers concerns which are not implicated in this case. The federal sovereign interests supporting the settled standing of the United States to bring such actions are no different in kind from the sovereign interests which the Commonwealth seeks to vindicate.

Parens patriae actions by the states are also familiar federal court remedies of long standing. *See, e.g., Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (reviewing cases); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 & n.12 (1972) (reviewing cases); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (antitrust); *Missouri v. Illinois*, 180 U.S. 208 (1901) (interstate pollution). The federal courts must take care, of course, that state parens patriae suits are not resorted to as devices for the vindication of private rights that would not otherwise be within federal subject matter jurisdiction.[15] There are no such concerns here, however, be-

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14. In *Brand Jewelers*, the Court also recognized the United States' authority to sue to enjoin widespread deprivations of due process in violation of the Fourteenth Amendment. *See also, United States v. City of Jackson, supra*, 318 F.2d at 14.

15. Thus states may not use the parens patriae device to permit private parties to resort to the Supreme Court's original jurisdiction, Oklahoma ex rel Johnson v. Cook, 304 U.S. 387 (1938) (state acting on behalf of private creditors); or to avoid the jurisdictional bar of the eleventh amendment. New Hampshire v. Louisiana, 108 U.S. 76 (1883) (citizen assigned board to state and state sued upon it). *See generally*, Hawaii v. Standard Oil Co., *supra* at 258 n.12. But the proposition sometimes derived from decisions barring a suit when the state acts as a collection agent, that assertion of a distinct proprietary interest is a prerequisite to a state parens patriae action,

cause claims for injunctive relief for violations of constitutional rights are unquestionably within the district court's subject matter jurisdiction. Thus those cases stressing the importance of some form of strict scrutiny of the states' separate sovereign interest in order to avoid enlargement of our subject matter jurisdiction are not relevant. Even if they were, however, the sovereign interests we have identified above survive such scrutiny.

Courts in this circuit have long recognized that the Commonwealth may bring a parens patriae action in the United States District Courts to enforce the fourteenth amendment. *See, e.g., Commonwealth of Pa. v. Brown*, 260 F. Supp. 323, 338 (E.D. Pa. 1966), *vacated and remanded on other grounds*, 373 F.2d 771 (3d Cir. 1967) (en banc), *on remand* 270 F. Supp. 782 (E.D. Pa. 1967), *affirmed*, 392 F.2d 120 (3d Cir.) (en banc), *cert. denied*, 391 U.S. 921 (1968) (Commonwealth suit to desegregate Girard College); *Commonwealth v. Flaherty*, 404 F. Supp. 1022 (W.D. Pa. 1975) (suit to redress employment discrimination by city and police officials); *Commonwealth v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974) (suit to redress employment discrimination by city officials). The defendants urge, however, that those cases are inconsistent with and were overruled by this court's

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cf. Commonwealth v. Ntl. Assn. of Flood Ins., 520 F.2d 11 (3d Cir. 1975), discussed *infra* at pp. 19-20 and note 16, is misconceived. The Supreme Court since the late nineteenth century has recognized that suits in vindication of federal property rights are but one aspect of the United States' parens patriae authority. The real bases for that authority are the government's obligations to secure proper law enforcement, and to protect the general welfare. *See, e.g.*, In re Debs, *supra* at 584-86; United States v. American Bell Telephone Co., 128 U.S. 315, 367-68 (1888); United States v. San Jacinto Tin Co., 125 U.S. 273, 284-86 (1888). *But see*, United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980). Those obligations devolve upon state governments as well as upon the federal government, and hence afford States an equivalent authority to initiate suits in the public interest.

decision in *Commonwealth of Pa. v. National Ass'n of Flood Ins.*, 520 F.2d 11 (3d Cir. 1975). Reliance on this case is misplaced for several reasons. In the first place the Commonwealth was in that case attempting as parens patriae to advance the interests of Pennsylvania flood victims against instrumentalities of the United States. It has been settled since *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923) that a state may not attempt as parens patriae to enforce rights of its citizens "in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as parens patriae when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." Thus the holding in *National Ass'n of Flood Ins.* is no more than an application of that settled rule. Moreover, apart from the nature of the defendants involved, that decision is simply an application of the rule to which we referred above — that parens patriae suits may not be used as a means to enlarge a federal court's subject matter jurisdiction over private claims which could not otherwise have been entertained. In that instance, failure to meet the administrative agency review requirement in 28 U.S.C. §2675(a) precluded the claim. Thus the holding in *National Ass'n of Flood Ins.* in no way bears upon the standing of Pennsylvania to seek injunctive relief in a federal court against violations of the fourteenth amendment. To the extent that any of the language in that case might be construed to support a different conclusion, it should be deemed overruled by this en banc decision.[16]

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16. In *Flood Ins.*, a panel of this Circuit asserted that the state must assert an interest "separate and apart from those injuries suffered by the state's citizens," and further suggested that availability of a private remedy to redress the conduct complained of would deprive the state of standing. 520 F.2d at 22. The second portion of that statement is inconsistent with prior Supreme Court decisions. *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (suit to

We have held above that the traditional federal law remedy of a parens patriae action is generally available to the states for the enforcement of the fourteenth amendment in appropriate cases. Even were that remedy unavailable, however, there is another reason such a remedy must be recognized in Pennsylvania. At the time the Commonwealth brought this action, Pennsylvania's Administrative Code authorized the Department of Justice "to take such steps, and adopt such means, as may be reasonably necessary to enforce the laws of the Commonwealth." 71 P.S. §294(b).[17] In *Commonwealth v. Gibney*, 21 D & C. 2d 5 (Chester Com. P. 1959) the Commonwealth brought an action to enjoin the proprietor of a public park from excluding Blacks. The defendants objected that only an individual plaintiff could bring such an action. The court held, however, that the

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enjoin burden on interstate commerce) (state permitted to sue as representative of natural gas consuming public despite possible private action); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (interstate pollution) ("the state has an interest independent of and beyond the titles of its citizens, in all the earth and air within its domain") ("By these oft-quoted words, [Justice Holmes] shifted the emphasis from the inadequacy of private remedies to the inherent power of the state as sovereign and intimated that the state has interests beyond . . . the aggregate interests of its citizens." Note, *Federal Jurisdiction — Suits By a State as Parens Patriae*, 48 N.C. L. Rev. 963, 965 (1970). By the same token, the "inherent power of the state as sovereign" to enforce its sovereign interest in ensuring that its agents do not violate the law itself states a separate injury. By its very nature, a state, holding sovereign powers, is capable of being injured in ways that private litigants cannot be. See discussion *supra* pp. 14-15. Thus conventional indicia of injury in fact to private litigants, such as specific monetary losses, are not particularly relevant here.

17. It is not necessary here to consider whether the Commonwealth Attorney's Act of October 15, 1980, No. 1980-164, which provides for an elected Attorney General, and establishes a General Counsel's office, was intended to restrict the Attorney General's power to take steps and adopt means reasonably necessary to enforce the laws of the Commonwealth.

Commonwealth had the same standing to seek injunctive relief as was recognized for the United States in *In re Debs*, 158 U.S. 564 (1895). 21 D & C at 9-10. Thus Pennsylvania law recognizes the availability of parens patriae relief even when individual relief might also be available.[18] That Pennsylvania law remedy is available in a federal district court proceeding in vindication of civil rights by virtue of Section 3 of the Civil Rights Act of 1866.[19]

The Commonwealth also argues that even if its parens patriae standing as a plaintiff were not recognized, it should in any event be recognized as an ade-

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18. *See also* Commonwealth v. Williams, 8 Bucks 206 (Com. Pl. 1958) (Commonwealth brought 42 U.S.C. §1982 injunctive action against KKK Members who had burned a Black family's home. 71 P.S. §294(b) held to confer authority on Commonwealth Attorney General to initiate civil rights action).

19. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S. §1988. *Cf.* Brazier v. Cherry, 293 F.2d 401 (5th Cir 1961) (adopting state survivorship statute) ("§1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in ef-

quate class representative of the class of persons in Millvale who in the past have been and in the future may be subjected to violations of constitutional rights by Millvale policemen. There is considerable merit to this contention, particularly in an action which appears to fall within Fed. R. Civ. P. 23(b)(2), for the interest in injunctive relief is common to the class. The trial court's failure to certify the action as a class action is not fatal to recognition of the Commonwealth's representative standing in such a case, since the same record has been made as would have been made had a Rule 23(b)(2) class been certified.[20] *See Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 430-31 (1976). (United States may continue action for injunctive relief even when no class has been certified and claims of individual plaintiffs are moot). It is not necessary to rest our recognition of the Commonwealth's standing as a plaintiff on this ground, however, since, as we have held above, both

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fect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so." 293 F.2d at 409.

Moor v. County of Alameda, 411 U.S. 693 (1973) does not mandate a different result here. In that pre-*Monell* decision, the Supreme Court held §1988 does not incorporate a state law making state subdivisions liable for the civil rights violations of their agents. In *Moor*, §1983 did not affect defendants' liability, and state law could not be imported to create a liability federal law at that time did not extend. In this case, there is no dispute that §1983 creates liability for the unconstitutional actions of municipal official and police defendants. The only question is whether §1988 imports Pennsylvania's method of enforcing that liability. *Moor's* approving reference to *Brazier v. Cherry*, 411 U.S. at 702 n.14, suggests that it does.

20. Indeed, the trial court held the Commonwealth's plaintiff status substituted for class certification.

> While the court did not certify a class action, it was held that the case was one in effect in view of the fact that the Commonwealth was representing the rights of all of its citizens and we are treating this case in such light.

480 F. Supp. at 695.

federal law and state law applicable by virtue of 42 U.S.C. §1988, recognize the Commonwealth's parens patriae plaintiff status.

One final consideration, not advanced by the defendants in so many words, but suggested at least obliquely as a reason for dismissing the Commonwealth's complaint, is the availability of injunctive or other relief in the Commonwealth's own courts. Somehow, the suggestion goes, it was unseemly for the Attorney General to resort to a federal forum in preference to a Pennsylvania state court. We do not know, and have no legitimate reasoning for inquiring why the Attorney General chose to bring an action for the vindication of federally protected rights in a federal forum. Congress has provided for federal question subject matter jurisdiction, and has not excluded the Commonwealth from resort to it. None of the familiar rhetoric of "equity, comity and federalism", which is advanced so often in support of federal door closing devices when the state is resisting relief in favor of private plaintiffs, has any application to cases in which the state, acting through one of its highest executive officers, seeks the aid of a federal court in assisting it in the discharge of its freely acknowledged duty to enforce the provisions of the federal constitution. Closing the doors of a federal court upon the Commonwealth as a plaintiff would be a perversion of principles of federalism.

Thus we find no merit in the defendants' contention that the Commonwealth's complaint should have been dismissed, and that therefore the injunction should be modified to eliminate all class-wide relief.

IV

Each defendant also contends that in subjecting him to an injunction the court erred, either in making findings of fact which are clearly erroneous, in admitting or excluding evidence, or in fashioning injunctive relief. We consider the several defendants' contentions separately.

A. Baranyai

The record includes extensive testimony about a series of incidents in which Baranyai subjected persons to unlawful arrest, unlawful search, unlawful brutalization and assault of persons in confinement, unlawful harassment of persons lawfully on the streets of Millvale, unlawful retaliation against persons who complained about his misconduct including unlawful arrest of such persons, and unlawful orders to persons to stay out of Millvale. With respect to all of these incidents, Baranyai either denied their occurrence or attempted legal justification. The plaintiffs' version of the events was supported not only by testimony of the alleged victims and independent witnesses, but in many cases by the testimony of other members of the Millvale police department. There were sharp issues of credibility. The court resolved those issues against Baranyai in more than 20 separate instances.[21] Its findings of fact concerning the historical events are not clearly erroneous. Moreover we cannot disagree with the court's conclusion, amply supported both by the magnitude of past violations over a relatively short period of time in a small town with a small police department, and by the attitude toward law enforcement set forth forcefully in Baranyai's own testimony, that there is a likelihood of repetition of violations in the future.[22]

Baranyai objects that since the complaint was filed on October 5, 1977 the court, in deciding whether to grant equitable relief, should have excluded all evidence of incidents occurring prior to October 5, 1975. There is no merit to this contention. There is evidence of a pattern or practice of violations of constitutional rights continuing up to and even after October 5, 1977. Evidence of the prior actions was admitted, as the trial court noted,

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21. 480 F. Supp. 688-91.
22. 480 F. Supp. at 698.

under Fed. R. Evid. 404(b), "to show motives, intent, preparation, purpose, knowledge or absence of mistake or accident and to show plan or design. It is also admissible under Rule 406 to show a pattern or routine practice of a defendant or organization."[23] This ruling was correct. *Hazelwood School District v. United States*, 433 U.S. 299, 309-10 n.15 (1977); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977); *Williams v. Anderson*, 562 F.2d 1081, 1086 n.7 (8th Cir. 1977). The injunction was issued not because of the events in isolation occurring prior to October 5, 1975, but because, as evidenced in part by those events, a pattern or practice of violations occurred over a long period of time which extended well within the period of the statute of limitations, and was likely to continue in the future.[24]

Finally, Baranyai objects that the injunction which was issued is overbroad, both with respect to the class of persons protected and with respect to his own activities. The objection about the class protected is predicated upon the argument, which we have rejected in part III above, that the rights of those persons were not properly before the court. To the extent that the injunction restricts his own activities, he urges that "the evidence in the present case did not justify such extraordinary remedy." (Brief of Baranyai and Porter, 33.) Having examined that evidence, we cannot say that the court erred in concluding that it was necessary both to subject

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23. 480 F. Supp. at 696.

24. Baranyai also contends that the court erred in excluding from evidence arrest records of certain witnesses who testified for the plaintiffs. His brief, however, refers us to nothing suggesting that these rulings, not specifically identified, were an abuse of the court's discretion in passing upon relevance. Fed. R. Evid. 403. *See* John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977) (trial court's refusal to admit 30 accident reports in suit alleging defective design not an abuse of discretion).

Baranyai to an injunction with respect to violations which were with him habitual, and, by removing him from the streets of Millvale in a police capacity dealing with the public, to prevent the officials of that borough from encouraging his excesses. We note, moreover, that in paragraph 6 of the permanent injunction the trial court retained jurisdiction to issue further orders. If, because of his change in employment, Baranyai feels that the injunction should be modified in some specific respect he may make application for such modification in the district court. His brief here requests no specific modification, but only total relief from the injunction. That relief we do not grant.

B. Police Chief Porter

The Chief of Police contends that no injunction should have been entered against him. He makes two points, one factual and one legal. The factual point is that there is no evidence warranting an injunction binding him, while his legal point is that the injunction interferes with the internal affairs of the police department in violation of the standards of *Rizzo v. Goode*, 423 U.S. 362 (1976). These arguments are necessarily interrelated, for as a statement of the appropriate scope of federal equitable relief, *Rizzo v. Goode* requires that we focus on the degree to which Chief Porter participated in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement. *See Allee v. Medrano*, 416 U.S. 802, 812 (1974). We quoted in Part I above, the court's finding of knowledge, acquiescence and support. The court also found that Porter was aware of allegations of police misconduct and abuse by Baranyai since at least April 13, 1974; that Porter never conducted a meaningful investigation or inquiry to determine if these allegations were true; and that Baranyai continued to engage in unconstitutional conduct, even during the tri-

al, with Porter's knowledge and approval.[25] Porter was present at the Borough Council Meeting on September 9, 1975 when, during the regular part of the meeting devoted to citizen complaints 8 persons complained about Baranyai's misconduct. (Plaintiff's Exhibit 3.) He was present on October 14, 1975 when six persons made such complaints (Plaintiff's Exhibit 4), on November 12, 1975 when another person made a complaint (Plaintiff's Exhibit 5), and on July 14, 1976 when five complaints were received (Plaintiff's Exhibit 6). On August 10, 1976 when two persons appeared to complain, Porter defended Baranyai. He observed "Officer Baranyai makes the most arrests; therefore Officer Baranyai is the one the people complain about." When the complaining citizen asked "are the Police Officers right all the time?" Porter responded, "they are right in what they say and do." (Plaintiff's Exhibit 7.) Six people appeared in Porter's presence to complain on September 14, 1976 about police practices. At the September meeting Councilman Beran criticized the police department's continued support of Baranyai. (Plaintiff's Exhibit 8.) At the next council meeting on October 12, 1976 Chief Porter made a speech, a copy of which is attached to Plaintiff's Exhibit 9, in which he vilified Councilman Beran, and certain citizens who made complaints. He defended the police practices with respect to enforcement of the loitering ordinance to prevent young people from congregating, and with respect to handling persons arrested "firmly," and suggested that such firm handling was necessary to compensate for the indulgence of "nice fathers." His statement illuminates his attitude toward the complaints against Baranyai:

> For those who choose to come to Council Meetings to complain about police officers or police action, I must tell them that if they feel they have a

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25. 480 F. Supp. at 691.

> legitimate complaint, file charges against the officer. But, I think the time has come for the harassment of the police officer and police department to stop. The continued harassment of the officers and department has my men and I hesitant at doing our job, for fear of being attacked at the next council meeting.

There is, moreover, ample record evidence that Porter retaliated against Officers Cepek, Fisinger, Pfeiffer and Snyder who complained about or testified to Baranyai's misconduct. There is no question that Porter actively supported Baranyai in his extreme measures, actively resisted all efforts to have the Borough Council exercise its statutory authority to suspend or remove him, and took affirmative steps to prevent the Commonwealth from obtaining the testimony of witnesses against him. Unlike the city officials in *Rizzo v. Goode*, who were not shown to have direct knowledge of the activities complained of, and who were remote from the day to day operations of the police department, Porter had knowledge and was intimately involved. The evidence concerning an agreement among counsel in this case that pending the court's disposition, Baranyai would be assigned to a desk job, affords a noteworthy indication of Porter's attitude. Despite the agreement, Porter returned Baranyai to street duty, defending that decision before the Borough Council. (Plaintiff's Exhibit 16; meeting of Nov. 15, 1977.) His actions, his illuminating speech to the council and even his testimony all point to the likelihood of his continuing encouragement of the pattern of misconduct which was found, and thus to the need for subjecting him to an injunction. Indeed, at a Council Meeting on July 12, 1977 Baranyai, commenting on his indictment, stated that he thanked Chief Porter for showing him the ways of the road in enforcing the ordinance of the Borough. (Plaintiff's Exhibit 15.) Porter did not demur.

C. Mayor McCarthy

In Part I we noted that the Mayor is by statute in full charge and control of the Borough's police force, with the mandatory duty to direct the manner in which policemen perform their duties, and with authority to suspend them temporarily until the Council can act. Plainly, the Mayor was obliged by law to investigate complaints of police misconduct and to take steps to prevent their recurrence. The court's finding that McCarthy received numerous complaints about Baranyai is amply supported both by the Council minutes disclosing his presence on most occasions when citizens complained, and by his own testimony respecting complaints made to him directly. The court found that he limited his investigation of those complaints to inquiries to Baranyai and his supporter Porter. The evidence supports this finding; indeed, there is no evidence that McCarthy initiated any more extensive inquiry. At council meetings he mollified complaining citizens by promising to investigate and report but did not do so. (Plaintiff's Exhibits 3, 4.) When Porter, while the suit was pending, returned Baranyai to street duty, McCarthy could have intervened, but did not. (1132a.) In the face of complaints to the Council, the Mayor announced "as a matter of fact, I'm certainly inclined to think Millvale needs more cops like Officer Baranyai. All of these complaints and charges against Officer Baranyai, to me, seem like nonsense and garbage!" (Plaintiff's Exhibit 12; 1116a.) Indeed he insisted, as a witness, that Baranyai had never been wrong. (1112a.) McCarthy publicly announced that he "strongly supports Officer Baranyai with respect to the performance of his job." (Plaintiff's Exhibit 4) and that he would never exercise his statutory power to suspend Baranyai. (Plaintiff's Exhibit 12; 1115a.) In vivid contrast, when other police officers testified unfavorably concerning Baranyai in the Commonwealth's criminal prosecution, or complained of his conduct, McCarthy

exercised his statutory powers to retaliate against them. (1140a et seq.) The Mayor's testimony indicates his enthusiasm for use of Ordinance No. 305 to prevent young people from congregating on the streets of Millvale. (1149a et seq.) The court's conclusion that the Mayor is causally linked to the pervasive pattern of constitutional violations which it found, is amply supported by the record. Indeed, the evidence supports an inference of McCarthy's affirmative involvement in Baranyai's illicit practices. Baranyai's style of law enforcement apparently was just what the Borough's chief law enforcement official desired. An injunction against him is entirely warranted.

D. The Borough Council

The Borough Council contends that *Rizzo v. Goode* requires the reversal of the injunction against it because the council has taken no active part in the Baranyai affair. That decision requires that officials against whom relief is ordered be causally linked to a pattern or practice of constitutional violations. In considering the Council's contention, we cannot ignore the obvious differences between the Borough of Millvale and the City of Philadelphia whose police department was involved in *Rizzo v. Goode*. In this case the record establishes that we are dealing with a very small police department which keeps only a few policemen on street patrol at any time. The Borough is small in area and population. The Borough Council has the statutory responsibilities with respect to the police department referred to in part I. Moreover it exercises them directly and regularly. Minutes of the Council Meetings in evidence disclose that the Chief of Police attends most council meetings, and as a regular practice reports to the Council on details such as the total number of calls to the police and the total number of arrests in each month. The Council

devotes a regular part of every meeting to hearing citizen complaints. It received complaints about Baranyai at the meetings of August 13, 1974; December 10, 1974; September 9, 1975; October 14, 1975; November 12, 1975; July 14, 1976; August 10, 1976; September 14, 1976; October 12, 1976; August 9, 1977; September 13, 1977; February 14, 1978. Many of those complaints concerned incidents which the district court found to be violations of constitutional rights. Although Councilmen Beran and Lawson sought to have the Council exercise its statutory power to suspend or terminate Baranyai, they were voted down. When Mayor McCarthy urged the Council to terminate Officer Cepek, a move which the trial court found to be retaliatory against Cepek's testimony against Baranyai, the Council voted to terminate. Only Beran and Lawson voted in Cepek's favor. When it was called to the Council's attention that, despite an agreement among counsel for the Commonwealth and counsel for the defendants that Baranyai would be kept off the streets pending the outcome of the trial, Baranyai was nevertheless assigned to street duty, the Council by inaction tacitly approved Porter's decision. (Plaintiff's Exhibit 16.) When Baranyai became aware that he faced criminal charges and asked for financial support for legal services for his defense, the minutes disclose.

> Chairman Seidel then asked the Borough Solicitor what should be done? Borough Solicitor, Alfred Maiello, stated that he would talk to the Chief of Police and officer Baranyai to find out all of the details and report back to council. Chairman Seidel suggested that [the] council as a whole give Officer Baranyai their support. Provided that it is agreeable with the Borough Solicitor upon his review of the facts of the charges. All Councilman [sic] gave their support for Officer Baranyai except Councilman Beran who did not comment. Chairman Seidel then stated how far does the Borough go in support fi-

> nancially? This question cannot be answered until the Solicitor gives a complete report as to his findings.

(Plaintiff's Exhibit 15.) This warm support for Baranyai following his indictment contrasts sharply with the attitude displayed toward Officer Cepek a few months later at the February 14, 1978 meeting. At the latter meeting Baranyai's attorney "extended his heartfelt thanks for the support given by the Council and the Mayor concerning Officer Baranyai." By then, Baranyai had been convicted of one count of simple assault, and two counts of official oppression.[26] The minutes disclose:

> Mayor McCarthy, addressing the members of the Council, asked the following question: I want an answer from the Council in regards (sic) to Officer Baranyai? How does the Council feel on this matter? Councilman Jerry Dawson then made a motion to continue to support Officer Frank Baranyai. It was seconded by Councilman Bedel. Chairman Seidel then asked for a question on the motion. The only question on the motion was given by Councilman Beran who opposed the motion. Councilman Beran stated that due to the recent developments in court where Officer Baranyai has been found guilty of three charges warrants me to say that I believe in the judicial process of the law and that I am in favor of a suspension of Officer Baranyai until the appeals are over. I would like to request a roll call on this matter, stated Council Beran. No roll call vote was taken.

(Plaintiff's Exhibit 12.)

Council President Seidel, the only council member who testified, acknowedged that the council received more complaints about Baranyai than about any other

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26. He was acquitted on 22 of 25 counts. We are advised that on appeal his conviction was reversed and remanded for a new trial.

officer. (1223a.) Normally the council did not investigate, but merely referred the complaint to the Chief of Police or the Mayor. (1224a.) The Council police committee never investigated a complaint. (1226a.)

The picture that emerges from the minutes and Seidel's testimony is that of a council which recognized that it had the power to investigate complaints, and recognized that only it had the power to terminate a policeman or suspend him for any extended period, but which, despite repeated complaints about Baranyai's course of conduct, was well satisfied to leave matters in the hands of Chief Porter and Mayor McCarthy, who were his active supporters. The court, looking at their longstanding knowledge, their inaction, their affirmative support, their unwillingness to suspend even following a conviction, their sharply contrasting treatment of Officer Cepek, certainly was not clearly erroneous in concluding that a majority of the council members participated in a pervasive pattern of support for his misconduct. Unlike the City defendants in *Rizzo v. Goode*, the Council is "directly responsible" for the police deparment's operations. *Rizzo v. Goode* does not require the adoption of an ordinance saying in so many words "we direct that the constitution be violated" before an inference can be drawn of the existence of an official policy of encouragement of such violations.[27] Inaction by those with a statutory duty

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27. The atmosphere prevailing in the Borough Council, however, suggests that such an ordinance would not have been completely far-fetched in Millvale. For the July 12, 1977 meeting, at which the Council voted to support Baranyai, the minutes disclose the following statement by one council member:

> Under the hearing of citizens concerning Officer Baranyai and the charges brought against him, Councilman Lawson stated that there have been differences of opinion between Officer Baranyai and myself in the past. However, I love him and give him my support 100%. It's about time that we get rid of the scum-bags in this Borough.

(Plaintiff's Exhibit 15.)

to take action can convey a potent message.[28] Moreover, the Council has coupled its failure to discipline Baranyai with retaliation against another police officer who had testified against Baranyai. The court did not err in concluding that the council's inaction and support were causally related to Baranyai's continuing pattern of misconduct.[29]

Moreover, the injunction against the council is justified as an appropriate means of making fully effective the injunction against the Chief of Police, the Mayor and Baranyai. 28 U.S.C. §1651(a) (the All Writs Act).[30] In *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), the Supreme Court held the All Writs Act au-

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28. A majority of the Supreme Court in *Rizzo v. Goode* rejected the contentions that Philadelphia's City officials maintained a constitutional duty to prevent civil rights violations by members of the police department "even without a showing of direct responsibility" for the actions of individual police, and that mere inaction constituted a breach of that duty. 423 U.S. at 375-76. But an analogy between the *Rizzo* defendants and the Borough Council here is not even superficially persuasive. The Borough Council has not a remote and vague duty to prevent civil rights violations, but a direct and affirmative statutory obligation to oversee the operations of the Millvale police force, and to survey the conduct of each member of that force. The nature of the Borough's organization under the Code and the Council's close proximity to the daily operations of the Millvale police force supply the causal connection the Supreme Court found lacking in *Rizzo*.

Failure to discharge an affirmative duty has long been recognized as a basis for liability. *See, e.g.*, McNiece and Thornton, *Affirmative Duties in Tort*, 58 Yale L. J. 1272 (1949).

29. The defendants note that the membership of the Council has changed from time to time. The injunction, however, is directed only at activity in an official capacity. A change in membership of the Council is not a reason for denying injunctive relief, but rather for substituting parties. Fed. R. Civ. P. 23(d); Fed R. App. R. 43(c).

30. 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

thorizes a federal court to compel a nonculpable third party's compliance with a court order.

> The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.

434 U.S. at 174 (citations omitted). This Circuit recently stated that "the basis of [injunctive] relief [under the All Writs Act] against a third party is not culpability, but practical necessity." *Pittsburgh-Des Moines Steel Co. v. United Steelworkers*, 633 F.2d 302, 307 (1980). Here, the Borough Council is "in a position to frustrate implementation" of the court's injunction, for under the Borough Code, ultimate responsibility for hiring, firing, and demoting police officers rests with the Council. *See* Part I, *supra*. The Borough Council's cooperation may well be required if Baranyai is to be confined to the position of a desk officer. Thus, although the Council should be held culpable under the standard of *Rizzo v. Goode*, section 1651 affords a separate reason for making the Council subject to the injunction against Porter, McCarthy and Baranyai.

V

The defendants also contend that the injunction is much broader than is warranted by the violations which were found.[31] The main focus of their objections is on paragraph (5), which enjoins Baranyai's employment as a policeman in Millvale in any but a desk capacity, and enjoins him from using weapons even in that capacity.

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31. They do not urge that the injunction is insufficiently specific to satisfy the requirements of Fed R. Civ. P. 65(d).

Considering the pattern or practice of violation of constitutional rights which the court found, this relief was not an abuse of discretion. If the Council was so interested in Baranyai's continued services that it would accept them on so limited a basis, it was left free to do so. But an order protecting persons in Millvale from Baranyai's unconstitutionally excessive zeal was necessary, and that which was entered is reasonable. In any event, because of Baranyai's new employment, many of the provisions of the injunction impose no serious burdens on the remaining defendants unless Baranyai returns to Millvale and is rehired. The injunction was for the most part tailored to Baranyai's expected presence. Finally, since the district court has retained jurisdiction, all defendants are free to apply for a modification of the injunction because of changed circumstances. That is a matter on which it may be necessary to make a further record. On the record before us, the injunction is tailored to the pattern or practice of violations which was found, and should be affirmed in all respects.

GARTH, *Circuit Judge*, concurring in part and dissenting in part, with whom Judges Aldisert and Hunter join:

The district court, in this case, made extensive factual findings which revealed that Frank Baranyai, a police officer, had disregarded and violated the constitutional rights of a number of individuals over a prolonged period of time in the course of some 22 separate incidents. Baranyai was employed by the Borough of Millvale, a borough of some 5,000 inhabitants located in Allegheny County, Pennsylvania. Additionally, the district court found that the Mayor and Police Chief, as well as the members of the Borough Council, were also liable in connection with Baranyai's actions. I write separately

because in significant respects my view of this appeal differs markedly from that of my colleagues.

First, and most important, I do not believe that the Commonwealth had standing as a plaintiff to bring this action on its own behalf or on behalf of its citizens. Second, I do not find sufficient evidence in this record to hold the Borough Council members liable and thus to subject them to an injunction.[1] *See Rizzo v. Goode*, 423 U.S. 362 (1976) and *Lewis v. Hyland*, 554 F.2d 93 (3d Cir.), *cert. denied*, 434 U.S. 931 (1977). Third, the district court had drawn its injunction on the basis of the Commonwealth as a party and the Borough Council members as culpable defendants, and did not decide the issue of class certification, as I believe it should have. Therefore, rather than attempt to draft and impose an injunction at the appellate level which could accommodate all of the changed circumstances which our rulings would require, I would remand to the district court for a determination of whether a class action should be certified and, in any event, for a restructuring of its injunction to accommodate the concerns expressed by and the rulings of this court.

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1. I am satisfied that the findings of the district court with respect to Baranyai, Mayor McCarthy and Police Chief Porter were not clearly erroneous, *see* Krasnov v. Dinan, 465 F.2d 1298 (3d Cir. 1972), and should therefore be upheld. I am also satisfied that despite Baranyai's resignation the case is not moot.

I believe this case cannot be considered moot both because of the inclusion of offending officials who remain in their positions, as defendants, as well as the fact that this case is before us as an appeal from the granting of injunctive relief under 28 U.S.C. §1292 (a)(1). As such, disposition has not finally been had of all matters, including the award of attorney's fees. In this case, that award could depend on this court's resolution of the underlying question of whether the Commonwealth was a proper plaintiff in this action. *Cf.* Bagby v. Beal, 606 F.2d 411, 414 (3d Cir. 1976). (Attorneys fees may be awarded to prevailing party without a merits review, even when case is moot on appeal.)

I.

A brief summary of the proceedings in this case may be helpful in understanding the issue of the Commonwealth's standing that has divided the court.

The panel before which this case was originally argued focused on the Commonwealth's standing. It was concerned with whether the Commonwealth could sue as a plaintiff under §1983, either because it had suffered injury to its sovereign interest or had demonstrated a quasi-sovereign interest giving it standing in a *parens patriae* capacity.

As any other plaintiff must do, in order to qualify as §1983 plaintiff, the Commonwealth must satisfy the statutory requirement of being a "citizen of the United States or *other person* . . . injured. . . ."[2] No claim has ever been made, nor could it be, that the Commonwealth is a "citizen of the United States". Therefore to sustain its plaintiff status, the Commonwealth must come within the rubric of an "other person" who has been injured.

The district court had not found it necessary to resolve the question of the Commonwealth's standing to sue for injury to its sovereign interest since it had held in a memorandum opinion of February 24, 1978 "that there was no showing that the Commonwealth of Pennsylvania had been injured personally by the series of events alleged in the complaint. . . ." *Commonwealth of Pennsylvania v. Porter*, 480 F. Supp. 686, 694-95

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2. 42 U.S.C. §1983 provides:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States *or other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(emphasis supplied).

(W.D.Pa. 1979). I understand the "personal" status, to which the district court referred, to be synonymous with injury to the Commonwealth's sovereign interest. Thus, the district court disposed of the Commonwealth's "personal" standing on an alternate ground: a failure to demonstrate injury. The district court's holding in this respect, however, was not critical to the continuation of the litigation because that court then allowed the action to proceed with the Commonwealth as a plaintiff under a *parens patriae* theory.

On appeal heard by a panel of this court, the Commonwealth continued to claim that as an "other person" within §1983, it had standing either "personally" or as *parens patriae* to maintain this action as a plaintiff. The panel held, contrary to the district court, that the Commonwealth had no standing as a plaintiff under §1983 on any basis, and in particular, held that on this record, the state could not sue as a plaintiff "other person" under that statute. As a consequence, rehearing was ordered by the court *en banc*, and the panel opinion was vacated.

Prior to the argument before the *en banc* court, the Commonwealth continued to assert both personal and *parens patriae* standing until, on the eve of rehearing, it moved to "withdraw[] its argument that it, the Commonwealth, is a person within the meaning of 42 U.S.C. §1983." While maintaining that the Commonwealth did not lack standing under the *parens patriae* doctrine, the Commonwealth nevertheless conceded "that the panel of this Court was correct in holding that the Commonwealth is not a person within the terms of §1983. . . ."

In so conceding, the Commonwealth apparently recognized that a state itself cannot seek the protection of §1983 with respect to its own sovereign interests.[3]

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3. No court of appeals has had the occasion to address this question but an examination of §1983 itself and a review of the legislative history that was examined in *Monell v. New York City Dept.*

Having put to rest one aspect of the standing claimed by the Commonwealth, I turn next to the alternate ground of *parens patriae* standing also asserted by the Commonwealth. I conclude that in this respect as well, *parens patriae* standing is not available to the Commonwealth in this case because the Commonwealth failed to allege and prove injury to a "quasi-sovereign" interest affecting all its citizenry. Instead, the Commonwealth has sought to litigate, as a volunteer, personal claims of its individual citizens. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

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of Social Services, 436 U.S. 658 (1978), leads to the conclusion that states were never deemed to fall within the class of those for whom Congress created a remedy when it enacted §1983.

First, §1983 itself speaks of liability for "the deprivation of any rights, privileges, or immunities" brought about "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." By its terms, the statute offers redress to those who are injured under the color of state authority. Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which is suing, turns the statute on its head. "Representative Bingham, the author of §1 of the Fourteenth Amendment, for example, declared the bill's [the predecessor of §1983] purpose to be 'the enforcement . . . of the Constitution on behalf of every *individual* citizen of the Republic.' . . ." (emphasis supplied, ellipsis in original, citation to Congressional Globe omitted). *Monell* at 685 n.45. And the *Monell* court in describing the function of §1983 quoted Representative Shellabarger describing the Act as providing "a civil remedy for . . . all *people* where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship" (emphasis supplied, citation to Congressional Globe omitted). *Id.* at 683.

The Commonwealth assuredly has the power to regulate conduct by its municipalities when that conduct infringes upon the constitutional rights of the Commonwealth's citizens. In addition, Congress has granted all citizens of this country a right to proceed against state and local officials, agencies, and municipalities for infringement of federally created rights. That is the obvious intendment and purport of §1983. But Congress has not gone so far

II.

Parens patriae standing has traditionally and uniformly been available to the sovereign when the relief sought could not be obtained by individuals:

> The concept of *parens patriae* is derived from the English constitutional system. As the doctrine developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal prerogative." These powers and duties were said to be exercised by the King in his capacity as "father of the country." Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics," and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "parens patriae" function of the King passed to the States.
>
> The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana v. Texas*, 176 U.S. 1 (1900), a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana merchants from sending goods

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NOTE —(*Continued*)

as to provide in §1983 a similar statutory remedy of which the state can avail itself.

Judge Gibbons in his separate opinion apparently agrees that §1983 was enacted to facilitate vindication of individual interests, and that neither §1983 nor the fourteenth amendment protects the Commonwealth. (Op. of Gibbons, J., typescript at 13.)

into Texas. This court recognized that Louisiana was attempting to sue, not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. 176 U.S., at 19. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were clearly recognized.

This Court's acceptance of the notion of *parens patriae* suits in *Louisiana v. Texas* was followed in a series of cases: *Missouri v. Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas v. Colorado*, 206 U.S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *New York v. New Jersey*, 256 U.S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas; and *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).

These cases establish the right of a State to sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests.

Hawaii v. Standard Oil Co., 405 U.S. 237 (1972) (footnotes and citations omitted).

The one constant throughout this doctrinal development has been that even as the concept of *parens patriae* has expanded, the sovereign was entitled to proceed under the doctrine *only* when no individual or group of individuals could seek the same relief.

> The Court has recognized the legitimacy of *parens patriae* suits. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-260 (1972); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900). It has, however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1975). Thus, in a case such as this one, the state, in order to assert *parens patriae* standing, must allege and must establish a widespread injury or threat which affects, or could potentially affect, the well being of virtually all of its citizens.[4] *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22 (3d Cir. 1975) (citations omitted) (quasi-sovereign interest "generally arises from either (1) the State itself having suffered injury, such as direct damage to its economy, or (2) the general public having suffered an injury so that no one individual has legal standing to sue.") *Common-*

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4. The "across the board" character of *parens patriae* was recognized as early as 1900. In concurring with the Court's dismissal of Louisiana's complaint, in which an embargo by Texas officials was claimed to harm to the city of New Orleans, Mr. Justice Brown concluded ". . . the objection to the present bill is that it does not allege the stoppage of all commerce between the two States, but between the city of New Orleans and the State of Texas. The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant. Louisiana v. Texas, 176 U.S. 1, 28 (1900) (Brown, J., concurring).

wealth of Puerto Rico v. Alfred L. Snapp & Sons, 632 F.2d 365, 369 (4th Cir. 1980) ("The decisions have generally agreed that a substantial portion of the population must be affected in order that the sovereign may represent them in a parens patriae capacity."); *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir.), *cert. denied* 429 U.S. 977 (1976) ("It thus appears that injury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can give rise to a quasi-sovereign interest in relief as will justify a representative action by the state."); *State of Missouri v. National Organization for Women, Inc.*, 467 F. Supp. 289, 299 (W.D. Mo. 1979), *affirmed* 620 F. 2d 1301 (8th Cir.), *cert. denied* 101 S.Ct. 122 (1980). (Missouri claims *parens patriae* standing because the "broadened base of incidence of injury (every economic sector affected) coupled with a consideration of the magnitude of its economic *effect* (post-multiplier) is sufficient to constitute an injury to the 'general economy' of the state."); *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 387, 389 (E.D. La. 1958) (3 judge court) (No *parens patriae* standing when "the interests of the single industry here involved must be held to be private interests, not interests affecting the whole economy or all the people of the state.").

I have found no decision of the Supreme Court, in which *parens patriae* standing has been permitted, which has not involved a burden upon the entire community. Nor has any case been called to my attention which holds that state *parens patriae* suits may be maintained to vindicate individual or personal rights such as those at issue here, even when constitutional violations are alleged.[5]

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5. The very cases cited throughout Judge Gibbons's opinion, which address *parens patriae* standing and which he claims support his conclusion that *parens patriae* standing is available *in this*

These, then, are the two unalterable requirements for *parens patriae* standing: "across-the-board burdens" which, in its very statement, excludes the prosecution of individual rights by the State and the affirmative requirement that the State may not, under the guise of *parens patriae*, litigate as a volunteer the personal claims of its citizens. Conversely, it is apparent that in cases where the proofs demonstrate that either the federal government, or a state government, is seeking to prevent harm to interests shared by *all* members of their respective communities, *parens patriae* may be appropriate.[6]

NOTE —*(Continued)*

case, recognize and satisfy the two requirements specified in case law and to which I refer: (1) that the burden must be community-wide and (2) that *parens patriae* is not available in suits seeking redress for individual injuries.

Relying on those same cases, I have concluded that *in this case*, neither requirement has been satisfied, and thus *parens patriae* standing must be denied.

Moreover, contrary to Judge Gibbons's reading of Commonwealth of Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11 (3d Cir. 1975), op. of Gibbons, J., typescript at 20 n.16, *Flood Insurers* is consistent with all Supreme Court authority to date. The fact that an individual action may be brought for an individual's own damages does not detract from the state's right to bring an action for injury to its quasi-sovereign interest. Thus a state may be injured by air pollution which affects all of its citizens and which may give rise to an injunctive or damage action by the state in its *parens patriae* capacity. Such an action would not preclude an individual from bringing an action in which he asserts his own personal damages and for which he seeks redress.

6. Unlike individual plaintiffs, States, when they are proper plaintiffs, may bring their actions directly in the Supreme Court. U.S. Const. Art. III, §2, cl. 2.

Therefore, the strictures placed on *parens patriae* standing when a state is a plaintiff are a reflection of the Supreme Court's concern that a state not abuse this constitutional prerogative. Accordingly, a state is denied *parens patriae* standing when it takes

In Judge Gibbons's separate opinion, he recites that "[t]he United States has been a frequent parens patriae plaintiff" where it has sought to prevent "harm to interests shared by all members of the community." Op. of Gibbons, J., typescript at 17. I agree that when *all* members of a community, state or federal, are subject to injury it may be an appropriate case for either the state or the federal government to assert its status as a *parens patriae* plaintiff. I hasten to note, however, that *in this case*, the harm alleged and the harm proved was limited to an exceedingly small number of the Millvale community — no more than fifty individuals — a far cry from *all* members of the [Commonwealth] community.[7] Even

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the place of an individual litigant and seeks to obtain in court that which an individual litigant could obtain by an individual cause of action. Pennsylvania v. New Jersey, 426 U.S. 660 (1976); Oklahoma ex. rel. Johnson v. Cook, 304 U.S. 387 (1938); Oklahoma v. Atchinson, T., & S.F.R. Co., 220 U.S. 277 (1911).

7. Interestingly, the cases which are cited in Judge Gibbons's opinion, *id.* at 17, are not authority for his *parens patriae* proposition, although I do not dispute that where *all* members of the community are involved, *parens patriae* standing may be appropriate. None of the cases cited at page 17 in Judge Gibbons's opinion even uses the term *parens patriae*. All of the cases cited involve interstate commerce. In some, the United States sued under the *Debs* doctrine to remove a burden on interstate commerce deriving its standing from the Commerce Clause of the Constitution. In re Debs, 158 U.S. 564 (1895); Florida-East Coast Ry v. United States, 348 F.2d 682 (5th Cir. 1965); United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963); United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970); United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962); United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961). In the remainder, the United States sued by virtue of an authorizing statute. United States v. Lassiter, 203 F. Supp. 20 (W.D. La.) (3 judge court), *aff'd per curiam*, 371 U.S. 10 (1962); United States v. Original Knights of the KKK, 250 F. Supp. 330 (E.D. La. 1965) (3 judge court); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962).

To the extent that *Brand Jewelers* is relied upon for the proposition that due process clause violations support the standing of the

Judge Gibbons acknowledges that "[I]n this case the record establishes that we are dealing with a very small police department which keeps only a few policemen on street patrol at any time. The Borough is small in area and population." Op. of Gibbons, J., typescript at 31.

Indeed, the record discloses that in this case, the impact of Baranyai's actions has been limited to no more than approximately one percent (1%) of Millvale's population and .00004% of the Commonwealth's entire, population.[8] Here, one police officer was responsible for some 22 incidents in a small Borough — population 5,000 — in Pennsylvania. The individual plaintiffs, who are the only ones with standing under §1983 to redress the injuries which they suffered, sought and obtained appropriate relief. Without question, if the Common-

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NOTE — *(Continued)*

United States in such circumstances, *see* op. of Gibbons, J., typescript at 17 n.14, it must be recognized that this court has specifically rejected any notion that the Attorney General may sue to enjoin widespread due process violations in the absence of an authorizing statute. *United States v. City of Philadelphia*, 644 F.2d 187, 202 n.23 (3d Cir. 1980). Moreover, the citation in n.14 to *United States v. City of Jackson*, 318 F.2d 1, (5th Cir. 1963) is of little relevance in the present context. *Jackson*, in dictum, was addressing the standing of the United States to challenge the action of *a state*, when the state, by a law or pattern of conduct, takes action which collides with national policy as expressed in the Constitution. In the present case, the United States is not challenging a state's action. That issue was discussed and disposed of by this court, but in a "city" context, when the United States sought an injunction against the City of Philadelphia. *United States v. City of Philadelphia, supra*. In this case, it is a state — the Commonwealth of Pennsylvania — which seeks redress for actions against individuals, when such actions have neither been alleged nor proved to have state-wide impact.

8. Pennsylvania's population for the year 1979 was provisionally estimated as 11,721,000 by the Bureau of the Census. Bureau of Census, provisional estimate, 1979. THE WORLD ALMANAC AND BOOK OF FACTS 695 (1981).

wealth has no standing, as I claim it does not, the district court would certify this action as a class action because the district court's denial of class certification was predicated solely upon the assumption that the Commonwealth had standing. Interestingly, the Commonwealth itself maintained that so long as there are individual plaintiffs, the standing of the Commonwealth was inconsequential. The Commonwealth's brief asserted:

> Certainly, there is no question about the standing of the individual plaintiffs to assert their rights and to maintain this law suit. Because of their presence, the Court need not consider whether the Commonwealth has standing to maintain this action. *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 264 N.9. (1977).

(Pa. Br. at 32).

III.

Having concluded that for *parens patriae* standing, two requirements are necessary, I turn to the question of whether those requirements are different, or less, in a fourteenth amendment setting. I conclude they are not.

A.

It has been asserted that "courts in this Circuit have long recognized that the Commonwealth may bring a parens patriae action in the United States District Courts to enforce the fourteenth amendment." Op. of Gibbons, J., typescript at 19. In support of that "long recognized" practice, three district court cases are cited: *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D.Pa. 1966), *vacated and remanded on other grounds*, 373 F.2d 771 (3d Cir. 1967) (*en banc*), *on remand* 270 F. Supp. 782 (E.D.Pa. 1967), *affirmed* 392 F.2d 120 (3d Cir.) (*en banc*), *cert. denied*, 391 U.S. 921 (1968); *Commonwealth of Pennsylvania v. Flaherty*, 404 F. Supp. 1022 (W.D. Pa. 1975); *Commonwealth of*

Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1964).

These three cases just do not support the broad proposition advanced — that a state, without more, has *parens patriae* standing in federal court to redress any violation of the fourteenth amendment. In two instances the analysis is as conclusory as the proposition itself, *Flaherty* at 1024, *Glickman* at 727-728. In the third instance, *parens patriae* standing was sustained not because of fourteenth amendment considerations, but because of the traditional standing accorded to a state when charitable trusts are involved, *Brown* at 338.

In *Glickman*, the district court simply held, without analysis, that racial discrimination damages "the state's quasi-sovereign interests — defined generally as the health and welfare of its citizens." *Id.* at 728. It is impossible to tell from the opinion whether the Commonwealth had alleged or indeed had proved or established its quasi-sovereign interest.

In *Flaherty* the district court found the Commonwealth to be a proper party to challenge a discriminatory hiring practice. Again, the opinion is silent as to the Commonwealth's allegations or proofs to sustain *parens patriae* standing and indeed the court's discussion of standing was even more summary than that found in *Glickman*. *Id.* at 1024.

Brown, as indicated, concerned Girard College, a charitable educational institution. The district court properly held that under Pennsylvania law, the Commonwealth had the duty, as *parens patriae*, to oversee the operation of charitable trusts which, by their very nature, lack beneficiaries with interests definite enough to enable them to sue for themselves. Significantly, Chief Judge Lord of the Eastern District of Pennsylvania, before whom *Brown* was tried, and who held that *parens patriae* standing was available in the *Brown* context, denied *parens patriae* standing in *Commonwealth of Penn-*

sylvania ex. rel. Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973).

In *Rafferty*, the Commonwealth brought suit under §§1981 and 1983, alleging that the employment of Ms. Rafferty had been unconstitutionally terminated by the Philadelphia Psychiatric Center because she had publicized her criticism of patient care and conditions at the Center. Judge Lord, in addressing the standing of the Commonwealth, refused to accept the Commonwealth's argument that "its desire for a free flow of information critical of state-operated mental health programs is a quasi-sovereign interest which may properly be asserted in a *parens patriae* action." *Id.* at 506. He distinguished *Commonwealth of Pennsylvania v. Brown*, to which we have adverted above, because there he had found standing in an across-the-board context. In *Rafferty*, he concluded that the discharge of Ms. Rafferty constituted injury to her alone — an injury in which the Commonwealth had no separate interest. In so concluding, Judge Lord wrote:

> However, although to have standing as *parens patriae* a state need not be affected by the acts of the defendants in the same way that an individual plaintiff must be, it nevertheless must be able to show (i) that a substantial number of the state's inhabitants have been injured, and (ii) that the state's injury is somehow separate and distinct from the injury to the individual plaintiff. Note, 18 Vill.L.Rev. 79 (1972). We think the Commonwealth has shown neither here.

Id. at 505.

Thus the broad statement that a state, without more, may bring a *parens patriae* action in federal court to enforce the fourteenth amendment has no analytical precedent to support it. Of greater import, for my purposes, those cases provide no exception to the *parens patriae* standard which requires that for *parens patriae*

standing to exist, the state must allege and prove a community-wide burden on the one hand, and on the other, the state must demonstrate that it is not prosecuting the action to vindicate a personal claim of a citizen.

B.

In an effort to bolster its *parens patriae* standing, the argument has been made, not by the Commonwealth in its pleadings, and not by the Commonwealth in its proofs, but rather in Judge Gibbons's separate opinion, that the Commonwealth has standing because it must bear the cost of Baranyai's abuse of Millvale citizens. Op. of Gibbons, J., typescript at 15. The argument proceeds as follows: the fourteenth amendment is the law of the land; the Commonwealth has an interest in seeing to its compliance; therefore the Commonwealth is interested in preventing the police officers hired by its many municipalities from violating that amendment; misconduct of local government officials undermines public confidence; misconduct by local officials interferes with the obligations of executive officers of the Commonwealth in upholding fourteenth amendment rights; and that, therefore, the burdens of enforcement imposed upon the Commonwealth will divert its resources from other tasks. Furthermore, the Commonwealth is interested in safeguarding the health and safety of individuals in Pennsylvania, the cost of which is ultimately borne by the Commonwealth. Op. of Gibbons, J., typescript at 14-15.

Aside from this attenuated logic and questionable reasoning, none of which has record support, my difficulty with these naked assertions are that they have never been formulated, alleged, proved, or even made by the Commonwealth. They do, however, appear in Judge Gibbons's separate opinion.

As further justification for the Commonwealth's status in this action, Judge Gibbons reasons that the Com-

monwealth should not be obliged to rely on individuals bringing their own actions to redress violations of their own constitutional rights, but rather the Commonwealth should be accorded special status as a plaintiff.

First, he states that individual victims may be unable to demonstrate a likelihood of future violations and thus they may be relegated to damage actions only. Second, he hypothesizes that the burdens of showing a pattern or practice of police misconduct are substantial and may not be within the resources of individual victims. Third, he suggests that there may be a fear of intimidation or retribution which may deter private enforcement actions. He therefore concludes as a result of the hypothetical costs that he has postulated, and as a result of the inabilities, burdens and fears that individuals may have, that the Commonwealth has advanced a significant quasi-sovereign interest of its own in this action. That interest is characterized as an interest in preventing future violations of constitutional rights of the Commonwealth's citizens in circumstances "in which [the Commonwealth] cannot reasonably anticipate that private enforcement will achieve the protection of those sovereign interests." He concludes by stating: "Any description of a parens patriae remedy, even the narrowest, includes the state of facts alleged in the Commonwealth's Complaint." (Op. of Gibbons, J., typescript at 14-17).

Unfortunately, the Commonwealth has never made these arguments in this case. Nothing appears in this case, or in this record, with respect to the Commonwealth's costs, which it is asserted, must be borne by the Commonwealth when, and if, future violations occur. Nothing appears in this case, or in this record, with respect to the undermining of ". . . the fiscal status of the Commonwealth's municipal creatures by exposing them to liabilities which can only be satisfied from tax revenues." Op. of Gibbons, J., typescript at 15. No allega-

tions, let alone proof of the Commonwealth's fiscal status or its municipalities' exposure can be found in this Complaint, in this record, or in this case.

I do not understand that a plaintiff's standing may be upheld merely because an appellate court, without allegations or proof, constructs a scenario which, *if alleged and proved*, would support standing.[9] I have always believed that a plaintiff must allege the facts on which his standing is predicated and, if challenged, must establish those facts by evidence. This court so held in *Marchezak v. McKinley*, 607 F.2d 37 (3d Cir. 1979). Indeed, in that case, one theory of standing was presented for the first time at the appellate level, and the court promptly rejected that attempt to bypass the district court. Id. at 41.

Nor are the requirements for allegations and proofs different with respect to *parens patriae* standing. In *Commmonwealth of Puerto Rico v. Alfred L. Snapp & Sons*, 632 F.2d 365 (4th Cir. 1980) the court noted three factors which normally determine whether there is a quasi-sovereign interest to support standing: "The size of the segment of the population that has been adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief without intervention by the sovereign." *Id.* at 369. In that case the district court found that the size of the segment of the population and the injury to the Puerto Rican economy were insufficient to warrant *parens patriae* standing. The court of appeals reversed, but the significant aspect of that case for our purposes is that, in reversing, the court of appeals rejected the district

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9. By this statement, I do not mean to indicate that if indeed the Commonwealth had alleged and proved (if it could) the many circumstances which Judge Gibbons has recounted, that I would hold them to be sufficient to *parens patriae* standing in this case. In my opinion, such allegations and proof would still not meet the stringent requirements of *parens patriae* standing which I have discussed in section II.

court's reasoning but only after a thorough analysis of the factual allegations that had been made to support Puerto Rico's *parens patriae* claim. The court accepted those allegations as true because it was reviewing the dismissal of the complaint on a 12(b) motion. *Id.* at 367.

In *State of Missouri v. National Organization for Women, Inc., supra*, the State of Missouri claimed *parens patriae* standing, alleging substantial injury to its economy and prosperity by reason of a convention boycott. The court undertook to analyze the evidence in support of this claim. The cancellation of convention bookings, the approximate revenue loss of $8.6 million, economic testimony by an expert, the effect upon hotels, restaurants, and the lead time requirement for national conventions, etc., were all thoroughly examined. The issue then became whether, considering all of the evidence, an economic injury had been suffered by the State of Missouri sufficient to confer upon the state standing as *parens patriae*.

It is thus apparent that in order to satisfy the stringent requirements of *parens patriae* standing, at the least, allegations of the quasi-sovereign interest involved must appear. And, where standing is controverted, *e.g.*, on the grounds that the state is seeking to represent individual rather than state-wide interests, evidence must be produced to support any findings that *parens patriae* requirements have been met. *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 387 (E.D. La. 1958) (3 judge court); *State of Missouri v. National Organization of Women, Inc., supra* at 297-98.

Here, however, the Commonwealth has neither alleged, nor demonstrated by evidence, any quasi-sovereign interest. It has not proved that such an interest even exists. One can search the complaint in vain for even the barest allegation of any such interest. None appears.

My position is a simple one. As a matter of law I have consistently maintained that the Commonwealth

has not met the two established criteria for *parens patriae* standing. It has not demonstrated a quasi-sovereign interest, and it has not demonstrated that the relief which it seeks is not the same relief that individual plaintiffs could have, and indeed have, obtained. Over and above that deficiency, however, is the additional obstacle which the Commonwealth has not overcome. Assuming that the Commonwealth had appropriately pleaded the elements of *parens patriae* standing, it has failed in this case to establish or demonstrate, on this record by adequate evidence and proof, that the interests which it might assert are present. Even if the Commonwealth had alleged all of the elements leading to a quasi-sovereign interest which appear in the separate opinion of Judge Gibbons, it has failed to offer evidence to prove them.

I do not say, that given an appropriate record showing a state-wide involvement, a *parens patriae* suit could not be sustained. I would suppose, for example, that if the Commonwealth alleged that all of its policemen and state troopers had conspired or were conspiring to violate constitutional rights of citizens throughout the entire state, and if it offered proof to that effect, it might indeed have a quasi-sovereign interest which would enable it to bring a *parens patriae* action. Such is not the case here where the record is barren of any such state-wide claim.

Not only is there a complete and utter absence of allegations and proof to sustain *parens patriae* standing, but the additional theories attributed to the Commonwealth, as alternate bases for its standing, are flawed as well.

C.

Judge Gibbons offers two additional theories which would permit the Commonwealth to maintain this action. He argues that 42 U.S.C. §1988, which provides that state statutes may be looked to for vindication of civ-

il rights, would provide *parens patriae* standing for the Commonwealth in this case. (*See* Op. of Gibbons, J., typescript at 20-23 and *see* n. 19 for full text of §1988). Even if the two Pennsylvania Common Pleas cases referred to in Judge Gibbons's opinion at page 21 in support of this conclusion were apposite, it is significant that the Commonwealth has never taken notice of them, for at no time has the Commonwealth asserted §1988 in support of its standing contentions. Given the opportunity before the district court and before this court, both at panel and *en banc* arguments, the Commonwealth invoked neither all of the Pennsylvania statutes which are found in Judge Gibbons's separate opinion nor 42 U.S.C. §1988 as a basis for its standing.

Because I am reluctant to address this aspect of standing, without either briefing or argument by the parties, I think it is inappropriate for the court at this stage of this proceeding, to consider a theory never advanced by the Commonwealth, and therefore never addressed by the defendants in this case. This court refused to do so in *Marchezak*, *supra*, where a party presented a new theory for the first time in this court. Here, where the theory has not even been advanced by a party, I believe the court should follow its established practice and decline consideration.

Perhaps recognizing that *parens patriae* standing may indeed not be available to the Commonwealth, Judge Gibbons asserts a fall-back argument that the Commonwealth, at the least, should be recognized as an adequate class representative of the class of persons in Millvale who may be subjected to violations of their constitutional rights by Millvale policemen. Op. of Gibbons, J., typescript at 22-23.

My difficulty with this argument is that although it is characterized as an argument made by the Commonwealth, a review of the Commonwealth's briefs and record does not disclose that the Commonwealth at any

time has ever argued that it may be an adequate class representative. Nor has the Commonwealth ever relied upon Fed.R.Civ.P. 23(b)(2) for its standing. Thus, this theory suffers from the same defect as the §1988 theory, in that both of them have seen the light of day for the first time in this court.

The only class action allegations or motions that appear in the record of this case are those brought by the individual plaintiffs (*see* Amended Complaint and Motions for Class Certification). In addition to the fact that the Commonwealth has never asserted, argued or briefed its standing as a class representative, an insurmountable obstacle would face it, if it ever sought to do so.

One of the prerequisites to a class action that the Commonwealth would have to establish is that the Commonwealth was a member of the class entitled to sue on behalf of all members of the class. It obviously is not. It has no claim typical of the claims of the class that it might seek to represent. Nothing appears of record in this case which could support a claim that the Commonwealth's constitutional rights had been violated by Baranyai. Had such a claim appeared, the Commonwealth would then be in a position of seeking to have its rights redressed under the protection of §1983 which, as I have previously indicated, is not available to protect a state. It is my impression that Judge Gibbons agrees with that conclusion. (Op. of Gibbons, J., typescript at 13) Moreover, if indeed the Commonwealth could satisfy this prerequisite of a class action, which it is apparent it cannot, then it would certainly be foreclosed from *parens patriae* standing because *parens patriae* standing requires that the state's interest be independent of and different from the interests of those individuals who are affected. For class certification the state would have to demonstrate just the opposite — an identity of interest with respect to the members it seeks to represent.

I suggest that the Commonwealth cannot have both similar and dissimilar claims and still be an adequate class representative. Undoubtedly, this explains why the Commonwealth itself did not seek to represent a class in this action.

Thus on any theory I find no standing available to the Commonwealth, under §1983, under *parens patriae*, under §1988, or under Fed.R.Civ.P. 23. Having concluded that the Commonwealth is not entitled to maintain this action as a plaintiff either on its own behalf or on behalf of its citizens, I turn to another aspect of this appeal: the liability of the Borough Council members.

IV.

To afford relief against the members of the Borough Council, the requirements of *Rizzo v. Goode*, 423 U.S. 362 (1976) must be satisfied. Thus, the officials' misconduct cannot be merely a failure to act. Such officials must have played an affirmative role in the deprivation of the plaintiffs' rights, *i.e.*, there must be a causal link between the actions of the responsible officials named and the challenged misconduct. *Id.* at 375-77. As this court observed in *Lewis v. Hyland*, 554 F.2d 93 (3d Cir.) *cert. denied*, 434 U.S. 931 (1977), *Rizzo* "was aimed at the failure of plaintiffs to prove the existence of an unconstitutional policy or plan adopted and enforced by the official defendants. Throughout, the Court emphasized the complete absence of any causal link between the individual police officers' conduct and the responsible authorities. Mere invocation of the words 'pattern' or 'plan' did not suffice without this causal link." *Id.* at 98.

As contrasted with the evidence and findings made by the district court which established a causal connection between Baranyai's conduct, and the Mayor's and Police Chief's ratification of that conduct, the findings made by the district court pertaining to the Borough Council are of a different character. –The findings

which implicate the Borough Council members are four in number:

> (1) the district court found that the Council heard complaints against Baranyai at numerous monthly meetings;
>
> (2) the Council failed to investigate the complaints;
>
> (3) the Council took no action to deter Baranyai's illegal conduct or to discipline Baranyai even after it had been informed of his conviction for such acts in state court; and
>
> (4) the Council passed two resolutions in support of Baranyai.

Thus, with respect to these four categories of findings, there are only two acts of the Council which demonstrate that the Council "has taken an active [i.e. an affirmative] part in the Baranyai affair," *Commonwealth of Pennsylvania v. Porter*, 480 F. Supp. at 702.

The first act to which the district court referred is the Council's adoption of a resolution on July 12, 1977 (Plaintiff's Ex. 15) which the district court characterized as "supporting Baranyai". The second act of the Council, to which the district court made reference, occurred on February 14, 1978 (Plaintiff's Ex. 12) when the Council adopted another resolution which the district court read as providing support to Baranyai. The conclusions drawn from these resolutions and from "the evidence" led the district court to hold that: (1) complaints to the Borough Council were useless and (2) that the Council had "failed to make any investigation or take any steps towards removing or suspending" Baranyai. 480 F. Supp. at 702.

I do not read the record in the same manner as the district court. The record does not reveal intentional acts (such as retaliation against witnesses) taken by the defendant Council members to further Baranyai's unlawful conduct. As I understand *Lewis* and *Rizzo*, the Coun-

cil members' actions, unlike those of Police Chief Porter and Mayor McCarthy, fell within the category of actions that, under *Lewis* and *Rizzo*, do not constitute grounds for injunctive relief. *Lewis* held that a "mere '*failure* to act [by responsible authorities] in the face of a statistical pattern' was found to provide no basis for injunctive relief," 554 F.2d at 98 (emphasis and bracketed material in original, footnote omitted). Here, of course, no statistical pattern is involved, rather the gravemen of the charge against the Council members is that complaints were made, but no action was taken. However, *Lewis* also held that no evidence of the essential causal link existed where there was no more than "an unfortunate insensitivity on the part of responsible officials toward reports of abuses. . . ." *Id.* at 101.

Thus, while the evidence reveals that the Mayor and Police Chief actively supported and indeed encouraged Baranyai's conduct, the Council members official actions constitute no more than inaction and insensitivity. The Council's first resolution did no more than "give Officer Baranyai [the council's] support[.] [p]rovided that [it] is agreeable with the Borough Solicitor upon his review of the facts of the charges." (Pl. Ex. 15). Seven months later the Council passed a "motion to continue to support Officer Frank Baranyai," (Pl. Ex. 12) after he had been convicted of three misdemeanor counts in a state criminal prosecution based on many of the same incidents underlying the district court decision in this case.

This evidence does not satisfy the threshold requirements of *Rizzo* and *Lewis*. Nor does a review of the record reveal other evidence which is sufficient to warrant treating the Council members in the same fashion as the other defendants. Thus, Judge Gibbons's attempt to distinguish this case from *Rizzo*, typescript at 34, is, in my view, particularly unsuccessful. I fail to see how the statutory duty of the Borough Council to control Baranyai is

somehow more "affirmative" than the duty of Philadelphia's city officials to prevent civil rights violations by the Philadelphia police force.

In this connection, I am additionally troubled by the change in composition of the Borough Council.[10] The record discloses that only one of the Council members (Lawson) named as a defendant was in office at the time of argument, and he tried to have Baranyai removed as a police officer. His term has since expired. Two Council member defendants had completed their service in 1977, and two new Council members are not named as defendants. As the record appears, therefore, none of the seven named Council members would be appropriate defendants in an action seeking injunctive relief unless they had been reelected — a subject upon which the record is silent. Thus, to the extent that the plaintiffs have the burden of proving that injunctive relief is appropriate as to the named defendants, they have not met this burden.[11] Indeed, *Lewis* held when "none of the incidents proved . . . occurred under the regimes of the *incumbent* 'responsible authorities,'" that "any link between responsible officials and the incidents of abuse is necessarily more attenuated. . . ." 554 F.2d at 101

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10. The injunction entered by the district court refers to all the defendants generally. To the extent, of course, that the injunction orders official action, it is obviously directed at the members of the Borough Council in their official capacity. However, it should be noted that the complaint sought relief against all defendants in their official *and* individual capacities and that paragraph 7 of the injunction leaves open the question of attorneys' fees and expenses. (See Appendix A for the complete order of the district court.) To affirm that order in the present posture of this case would appear to be inappropriate. For this reason, as well as for the reasons discussed in part V, *infra*.

11. Rizzo v. Goode, 423 U.S. 362, 378 (1976) noted:

> Even in an action between private individuals, it has long been held that an injunction is "to be used sparingly, and only in a clear and plain case." *Irwin v. Dixion*, 9 How. 10, 33 (1850).

(emphasis supplied). Accordingly, as to the members of the Council, the *Rizzo* and *Lewis* standards have not been met, and the injunction, to the extent it is imposed on these defendants, should be vacated.

V.

Not only do I differ from my colleagues with respect to the Commonwealth's status in this case as a plaintiff, but as I have explained, I also am convinced that the record does not support an injunction against the members of the Borough Council. These two conclusions lead me to believe that the appropriate jurisprudential action to be taken is a remand to the district court so that it may redraw its injunction. In particular, I am concerned about the effect of the district court's order as it concerns the Borough Council members.[12]

First, it must be recognized that the entire injunctive order is outdated because Baranyai has left Millvale's employ and thus those portions of the order which address his employment and conduct are inappropriate. However, because it is this order which is on review before this court and which this court is affirming, I must address the provisions of the order as they appear.

Second, I note that the district court in framing paragraph 4 of its injunction, enjoined *all* defendants from "further engaging in [unconstitutional] conduct . . . or participating in violations of this injunction by Baranyai." Since that order was entered, Baranyai, as we know, has left the police force in Millvale. Obviously, the district court intended this injunction to operate against the Borough Council members as well as against the other defendants, but as I have pointed out, the record fails to support an injunction against the Borough Council members. More significantly the membership of the Council is no longer the same. These circumstances raise serious questions apart from the issue of over-

12. The entire order of the district court dated November 16, 1979, is reproduced as Appendix A to this opinion.

breadth, as to the implementation of this portion of the district court's decree.

Third, the first segment of paragraph 5 of the injunctive order apparently enjoins all of the defendants from employing Baranyai. This segment obviously suffers from the same defect as paragraph 4 insofar as it pertains to the Council member defendants. Moreover, because the Pennsylvania Borough Code apparently vests the authority in the Borough Council to remove borough policemen, only the current members of the Council, who are not named as defendants, have the capacity to comply if indeed the individual members, as distinct from the Council as an entity, may so act. The second segment of paragraph 5 which enjoins Baranyai from serving as other than an unarmed desk policeman appears to be inconsistent with the earlier direction that he not be employed at all. It can however, depending upon its punctuation, be read consistently so as to provide that all the defendants are enjoined from employing Baranyai as other than an unarmed desk officer, and that Baranyai is enjoined from serving as other than an unarmed desk officer. In favoring this latter construction, which avoids an improbable internal inconsistency, another question is raised as to the Council members' authority to assign or reassign police officers to particular duties under the Pennsylvania Borough Code. Whatever the correct interpretation may be, it is unquestionable, however, that the injunctive order must involve the exercise of the Mayor's delegable powers under the Pennsylvania Code and the assignment to particular duties by the Mayor and/or Police Chief.

This in turn implicates the constitutional principles referred to by the district court in its discussion of "Remedies", 480 F. Supp. 703-04. The district court held the injunctive relief which it provided would not interfere with the daily internal workings of the police department in accordance with the teachings of *Rizzo*, 480 F. Supp. 704. However, the district court reached that conclusion

only after it had found *all* the defendants liable and therefore subject to injunction. As I have pointed out, however, the defendant members of the Council may be not enjoined, thereby casting some doubt on what injunction would have been imposed had the district court not found them liable.

Fourth, in addition to the problems presented by the terms of the district court's injunction and the circumstance that the Council members are outside its operation, still another substantial issue must be considered. In my opinion the Commonwealth should have been dismissed as a plaintiff. Its dismissal would leave open the question of whether the individual plaintiffs are entitled to the relief they seek without class certification and, if not, whether a class should be certified. It must be remembered that the district court only denied class certification because it assumed that the Commonwealth was a proper plaintiff in this action.

In light of these unresolved problems, I believe it is a mistake for us at our appellate level to confront these issue and the tensions which they create. If a class is to be certified, obviously it should be the district court which in the first instance makes that determination and it should be that court which decides the contours of such a class.

If problems exist with respect to the terms of this decree, as I believe they do, it is for the district court to modify those terms so that the decree is internally consistent, and so that provision is made to accommodate our directions. Moreover, even though we have held that this appeal is not moot, it appears that recognition of the fact that Baranyai has left Millvale, must necessarily affect the form that the ultimate injunctive decree must take. Because of these considerations, I cannot agree that the injunction should be affirmed without having it redrawn by the district court. I would remand to the district court so that it may restructure the injunction in

accordance with the rulings which this court has ordered.[13]

VI.

Because in my opinion the Commonwealth has failed to establish its right to maintain this action as a plaintiff, I dissent from the court's opinion which holds otherwise. I also disagree with the court's judgment which does not remand this case to the district court for modification and refinement of its injunction, particularly since the record does not support the issuance of an injunction against the Borough Council's members. Unlike my colleagues I would also direct the district court to reconsider its rulings on class certification, if an appropriate application is made.

To the extent, therefore, that the Commonwealth is permitted status as a plaintiff in this action, and to the extent that no provision is made for reconsideration of a class action, and to the extent that the proceeding is not remanded to the district court — I dissent. To the extent that the court affirms the district court's findings with respect to Baranyai, the Mayor and Police Chief and thus the propriety of injunctive relief as to those defendants — I concur.

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13. In the restructuring of its injunction, I would permit the district court to exercise its own discretion as to whether it requires supplemental hearings and a supplementary evidentiary record.

Additionally, even though I would dismiss the members of the Borough Council as defendants in this action, because the present record does not support relief against them, it may be necessary for the district court in redrawing its injunction to require actions to be taken by the Council. Nothing that I have said with respect to the named Council members and the unavailability of injunctive relief against them on this record, should prevent the district court from fashioning adequate relief with respect to proper parties, if in its findings and discretion it holds such relief to be appropriate. Nor would I restrict the plaintiffs from either seeking to supplement the record or from attempting to restructure their action in light of our actions (*see* Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)), subject always to the district court's discretion.

APPENDIX

ORDER

AND NOW, to wit, November 16, 1979, on the basis of the evidence presented in this case and upon due consideration of the briefs and arguments of counsel and the court finding that the evidence shows that there is a continuing course of conduct on the part of the defendants which violates the constitutional rights of plaintiffs and those individuals they represent and that an injunction is necessary against defendant Baranyai and the other defendants requiring that Baranyai perform the duties of a police officer in a constitutional manner and that the other defendants should be restrained from aiding, abetting, encouraging his conduct or ratifying or participating in the same, for reasons set forth in the accompanying opinin [sic],

IT IS THEREFORE ORDERED that:

(1) A permanent injunction is hereby issued against the defendant Frank L. Baranyai and all persons acting in concert with him enjoining him from (a) stopping, arresting or imprisoning plaintiffs or other individuals without adequate probable cause, (b) physically abusing or otherwise treating plaintiffs or other individuals, (c) using wrongful or excessive force while bringing about lawful arrests or in otherwise handling individuals arrested after they have been secured in custody.

(2) The defendant Baranyai together with the defendants James D. Porter, Chief of Police and Regis J. McCarthy, Mayor of the Borough of Millvale, Allegheny County are enjoined and from harassing, threatening, intimidating or retaliating against the plaintiffs or other individuals in violation of their First and Fourteenth Amendment rights of speech assembly and association and their right to

equal protection of the laws and their constitutional right to travel for lawfully complaining against the conduct of defendant Baranyai or testifying at trials or hearings involving his conduct.

(3) The defendant Baranyai is restrained from stopping, seizing and searching plaintiffs or other individuals on the streets whether in the Borough of Millvale or elsewhere, in their homes or otherwise without adequate cause in violation of their First and Fourteenth Amendment rights and [sic] to freedom from unreasonable searches and seizures and in violation of their rights not to be deprived of property without due process of law.

(4) All of the defendants are enjoined from further engaging in conduct as enjoined above or from encouraging, affirming, or participating in violations of this injunction by Baranyai.

(5) All of the defendants are hereby enjoined effective 5 days from the date of this order from employing defendant Baranyai and Baranyai is enjoined from serving as a police officer or law enforcement official on any basis in the Borough of Millvale except as a desk policeman whose activities shall be entirely confined to the police station of the Borough of Millvale and he is further enjoined from possessing or using upon prisoners or other persons any weapons of any kind, particularly without limiting the generality of the foregoing any blackjack, nightstick, firearm of any kind, brass knuckles or any other offensive weapon who that his activities with the Millvale Police Force shall be entirely confined to desk duty and in the course of such duty he shall not be permitted to use any weapons of any kind upon prisoners or other persons.

(6) The court will retain jurisdiction of this case for the purpose of issuing further orders to in-

sure that the requirements of this order be carried out.

(7) If plaintiff's counsel have any claim for attorney's fees and expenses they shall present the same properly itemized and verified to this court within 20 days from the date of this order following which the court will, if necessary, hold further hearings with respect to the same.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2653, 79-2684 and 79-2685

COMMONWEALTH OF PENNSYLVANIA and
RICHARD W. BAUMANN, JOSEPH BLUME,
JAMES MAGES and BERNARD W. PEITZ JR.,
Individually and on behalf of all
others similarly situated

v.

JAMES D. PORTER, Chief of Police; Borough of
Millvale; FRANK L. BARANYAI, Borough of
Millvale Police Officer; REGIS J. McCARTHY,
Mayor of the Borough of Millvale, CARL SEIDL,
President of the Millvale Borough Council;
MAURICE P. BEDEL, SR., JAMES BERAN, JOHN L.
CAVANAUGH, JERRY DAWSON, JAMES H.
LAWSON and STEPHEN MIKUS, Members
of the Millvale Borough Council,

Frank L. Baranyai, *Appellant in No. 79-2653*
Regis J. McCarthy, et al., *Appellants in No. 79-2684*
James D. Porter, *Appellant in No. 79-2685*

D.C. Civil No. 77-1164)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 6, 1980

Before: ALDISERT, GARTH and VAN DUSEN,
Circuit Judges

Reargued In Banc May 12, 1981

Before: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion Filed July 30, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 8

In the first line following the quote remove the comma after the word *"also"*

Page 17

In the penultimate line, delete the word "Commonwealth" and replace it with "commonweal"

Page 18

In the fifth line of the first full paragraph, insert a comma after 1980.

Page 19

In the sixth line of the second full paragraph, close the parenthesis following (W.D. La.)

Page 20

In the seventh line of footnote 15, remove the comma following *See generally*

Page 21

In the seventh line of the first full paragraph, insert a comma following the word "remand"

In the second line of the continuation of footnote 15, delete "pp. 19-20" and insert "p.22" in its place.

In the penultimate line of that footnote, "States" should read "states"

Page 23

In line 12, the cite should properly read "21 D. & C. 2d 5 etc."

In the third line from the last in the continuation of footnote 16, delete "pp. 14-15" and replace it with "pp. 16-19"

Page 24

In the third line the cite following "(1895)" should read "21 D. & C. 2d at 9-10."

The final line of that paragraph should read "1866, 42 U.S.C. §1988.[19]"

Footnote 19 should be an indented quote.

JOHN J. GIBBONS

Circuit Judge

DATED: August 5, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2653

COMMONWEALTH OF PENNSYLVANIA and RICHARD W. BAUMANN, JOSEPH BLUME, JAMES MAGES and BERNARD W. PEITZ, JR., Individually and on behalf of all others similarly situated

v.

JAMES D. PORTER, Chief of Police; Borough of Millvale; FRANK L. BARANYAI, Borough of Millvale Police Officer; REGIS J. MC CARTHY, Mayor of the Borough of Millvale; CARL SEIDL, President of the Millvale Borough Council; MAURICE P. BEDEL, SR., JAMES BERAN, JOHN L. CAVANAUGH, JERRY DAWSON, JAMES H. LAWSON and STEPHEN MIKUS, Members of the Millvale Borough Council

Frank L. Baranyai, *Appellant*

No. 79-2684

COMMONWEALTH OF PENNSYLVANIA and RICHARD W. BAUMANN, JOSEPH BLUME, JAMES MAGES and BERNARD W. PEITZ, JR., Individually and on behalf of all others similarly situated

v.

JAMES D. PORTER, Chief of Police; Borough of Millvale; FRANK L. BARANYAI, Borough of Millvale Police Officer; REGIS J. MC CARTHY, Mayor of the Borough of Millvale; CARL SEIDL,

Exhibit "D"

President of the Millvale Borough Council; MAURICE P. BEDEL, SR., JAMES BERAN, JOHN L. CAVANAUGH, JERRY DAWSON, JAMES H. LAWSON and STEPHEN MIKUS, Members of the Millvale Borough Council

Regis McCarthy, Carl Seidl, Maurice P. Bedel, Sr., James Beran, John L. Cavanaugh, Jerry Dawson, James H. Lawson and Stephen Mikus, *Appellants*

No. 79-2685

COMMONWEALTH OF PENNSYLVANIA and RICHARD W. BAUMANN, JOSEPH BLUME, JAMES MAGES and BERNARD W. PEITZ, JR., Individually and on behalf of all others similarly situated

v.

JAMES D. PORTER, Chief of Police; Borough of Millvale; FRANK L. BARANYAI, Borough of Millvale Police Officer; REGIS J. MC CARTHY, Mayor of the Borough of Millvale; CARL SEIDL, President of the Millvale Borough Council; MAURICE P. BEDEL, SR., JAMES BERAN, JOHN L. CAVANAUGH, JERRY DAWSON, JAMES H. LAWSON and STEPHEN MIKUS, Members of the Millvale Borough Council

James D. Porter, *Appellant*

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 16. 1979

(Civil Action No. 77-1164)

Argued October 6. 1980

Before: ALDISERT. GARTH and VAN DUSEN.
Circuit Judges

(Opinion Filed February 19. 1981)

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of the American Civil
Liberties Union

OPINION OF THE COURT

GARTH, *Circuit Judge*.

This appeal requires us to decide whether the Commonwealth of Pennsylvania may maintain and bring an action under 42 U.S.C. §1983 as an aggrieved "other person".

The Commonwealth and certain individual plaintiffs sought to enjoin the Chief of Police, a police officer,

and the Mayor and members of a Borough's council because of alleged unconstitutional actions taken by Officer Baranyai against the citizens of the Borough of Millvale. The district court, having found that Baranyai had indeed committed many of the acts alleged, and that this conduct was ratified by the other defendants, enjoined all of the defendants.

Because we hold that the Commonwealth had no standing as a plaintiff in this action, and that the members of the Borough Council cannot be held liable on the record of this case and the standard elaborated in *Rizzo v. Goode*, 423 U.S. 362 (1976), we are obliged to reverse the district court in these respects. In reversing the district court, however, we do not disturb the district court's findings of fact with respect to Baranyai's actions or the ratification of those actions by the police chief and Mayor of Millvale. Thus, as to those defendants, we agree with the district court's rulings.

I

Beginning some time before the middle of 1974, the Mayor, Chief of Police, and Borough Council of Millvale began receiving complaints about one of the Borough's policemen, Frank L. Baranyai. These accusations about Baranyai were made by various citizens. They charged that Baranyai had violated their constitutional rights by physically abusing them in a brutal manner, by threatening and harassing them and by illegally arresting and detaining them. Subsequently, the Commonwealth and four individual plaintiffs instituted a §1983 action[1]

1. The original complaint was brought only by the Commonwealth alone. Thereafter, an amended complaint was filed in which the individual plaintiffs were named. The Statement of Fac and the relief requested were identical in both complaints, but the amended complaint also included class action allegations. Our references to the complaint throughout this opinion will be to the amended complaint only.

against Baranyai, his police chief, the Mayor and the members of Council.

The gravemen of the complaint was that Baranyai, by his many unlawful actions, had violated the constitutional rights of Pennsylvania citizens, some of whom resided in Millvale. Some 31 separate incidents were described. The 31 incidents included actions taken against the four named plaintiffs as well as actions taken against others. The complaint also charged that the Borough defendants, including the police chief, refused to exercise control over Baranyai's pattern of unconstitutional behavior despite their knowledge of his actions and their ability to restrict his activities. The complaint, which included class action allegations, sought injunctive relief against all the defendants.

Prior to trial, the individual plaintiffs moved for class certification. The district court denied class certification

> for the reason that the Commonwealth of Pennsylvania as *parens patriae* is representing the citizens of the State generally in this action and if there is any further need for class action which may later appear in this case plaintiff's [sic] may move at that time for reconsideration of the same.

The non-jury trial of this action commenced on April 23, 1979 after a year of extensive discovery by the parties.[2] The court heard some 14 days of testimony and made some 44 Findings of Fact. Because these findings are separately set forth in the district court's opinion,[3] we will not recount them in detail here. It is sufficient for our purposes to note several incidents that typify the

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2. Earlier the district court in response to motions made by the defendants had ruled the Commonwealth's action was not barred by Rizzo v. Goode, *supra;* and that the Commonwealth had standing to sue as *parens patriae*.

3. Commonwealth of Pennsylvania v. Porter, 480 F. Supp. 686, 688-692 (W.D. Pa. 1979).

conduct found by the district court. The court found that Baranyai had brutalized and unlawfully assaulted plaintiff Mages by beating him with his fists and with a blackjack, and by threatening to shoot him with a shotgun and revolver while Mages was handcuffed and confined in the Millvale police station.

The court also found that Baranyai had struck one Richard Stefanik about the face and head with a flashlight while Stefanik was in his custody and that he had brutalized one David Burchill by beating him with a nightstick after Burchill had been handcuffed and was under Baranyai's control. Other similar incidents of assault, unlawful arrests, illegal searches, unlawful detentions, harassment, intimidations, and retaliation are catalogued by the district court in its findings that Baranyai engaged in unconstitutional conduct on a number of occasions.[4]

The district court also found that the other defendants had knowledge of Baranyai's acts and approved of them and that their unconstitutional conduct was likely to continue unless all defendants were enjoined. On November 16, 1979 the district court entered its order which essentially enjoined all the defendants from continuing conduct such as the conduct which gave rise to this suit. A copy of the November 16, 1979 order of the district court is set forth in full in the margin.[5] There-

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4. In its finding (43), the district court found that 16 of the incidents alleged in the plaintiffs' preliminary Proposed Findings of Fact were not supported by evidence and with respect to these, the court found in favor of Baranyai.

5. ORDER

AND NOW, to wit, November 16, 1979, on the basis of the evidence presented in this case and upon due consideration of the briefs and arguments of counsel and the court finding that the evidence shows that there is a continuing course of conduct on the part of the defendants which violates the constitutional rights of plaintiffs and those individuals they represent and that an injunction is necessary against defendant Baranyai and the

after, two modifications of the district court's order, the last entered by a judge of this court, permitted Millvale to substitute, for the provisions of paragraph 5 of the order, Millvale's obligation as security against any future constitutional conduct by Baranyai.

NOTE 5 — *(Continued)*

other defendants requiring that Baranyai perform the duties of a police officer in a constitutional manner and that the other defendants should be restrained from aiding, abetting, encouraging his conduct or ratifying or participating in the same, for reasons set forth in the accompanying opinion [sic].

IT IS THEREFORE ORDERED that:

(1) A permanent injunction is hereby issued against the defendant Frank L. Baranyai and all persons acting in concert with him enjoining him from (a) stopping, arresting or imprisoning plaintiffs or other individuals without adequate probable cause, (b) physically abusing or otherwise treating plaintiffs or other individuals, (c) using wrongful or excessive force while bringing about lawful arrests or in otherwise handling individuals arrested after they have been secured in custody.

(2) The defendant Baranyai together with the defendants James D. Porter, Chief of Police and Regis J. McCarthy, Mayor of the Borough of Millvale, Allegheny County are enjoined and restrained from harassing, threatening, intimidating or retaliating against the plaintiffs or other individuals in violation of their First and Fourteenth Amendment rights of speech assembly and association and their right to equal protection of the laws and their constitutional right to travel for lawfully complaining against the conduct of defendant Baranyai or testifying at trials or hearings involving his conduct.

(3) The defendant Baranyai is restrained from stopping, seizing and searching plaintiffs or other individuals on the streets whether in the Borough of Millvale or elsewhere, in their homes or otherwise without adequate cause in violation of their First and Fourteenth Amendment rights and [sic] to freedom from unreasonable searches and seizures and in violation of their rights not to be deprived of property without due process of law.

(4) All of the defendants are enjoined from further engaging in conduct as enjoined above or from encouraging, affirming, or participating in violations of this injunction by Baranyai.

II

42 U.S.C. §1983 provides:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States *or other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(emphasis supplied).

As an "other person", the Commonwealth as a plaintiff brought this action against the named defendants for injunctive relief.

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(5) All of the defendants are hereby enjoined effective 5 days from the date of this order from employing defendant Baranyai and Baranyai is enjoined from serving as a police officer or law enforcement official on any basis in the Borough of Millvale except as a desk policeman whose activities shall be entirely confined to the police station of the Borough of Millvale and he is further enjoined from possessing or using upon prisoners or other persons any weapons of any kind, particularly without limiting the generality of the foregoing any blackjack, nightstick, firearm of any kind, brass knuckles or any other offensive weapon who that his activities with the Millvale Police Force shall be entirely confined to desk duty and in the course of such duty he shall not be permitted to use any weapons of any kind upon prisoners or other persons.

(6) The court will retain jurisdiction of this case for the purpose of issuing further orders to insure that the requirements of this order be carried out.

(7) If plaintiff's counsel have any claim for attorney's fees and expenses they shall present the same properly itemized and verified to this court within 20 days from the date of this order following which the court will, if necessary, hold further hearings with respect to the same.

To this point, judicial consideration of §1983 as a vehicle for redressing rights implicating states or their instrumentalities has focused on the question of whether such state entities may be sued as *defendants* under §1983. *See, e.g., Skehan v. Bd. of Trustees of Bloomsburg State College*, 590 F.2d 470, 491 (3d Cir. 1978); *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Alabama v. Pugh*, 438 U.S. 781 (1978); *Quern v. Jordan*, 440 U.S. 332 (1979). Obviously, in this case, where the Commonwealth is not a defendant, but is rather a plaintiff, cases which analyze §1983 in terms of defendants are of limited assistance. Thus, rather than discuss "defendant" cases, we will direct our attention to the question of whether a state may be a plaintiff or "other person" under §1983.

Because of the posture of this case, where only the Commonwealth and certain individuals are plaintiffs, we must initially determine whether the Commonwealth of Pennsylvania has standing to seek relief in either (1) a personal or (2) a representative capacity.

A.

We turn first to the question of whether the Commonwealth in its personal capacity may sue the municipal officials named as defendants under 42 U.S.C. §1983. To qualify as a §1983 plaintiff, the Commonwealth must satisfy the statutory classification of being a "citizen of the United States or *other person* . . . injured . . . ." No claim has ever been made, nor could it be, that the Commonwealth is a "citizen of the United States". Therefore to sustain its plaintiff status, the Commonwealth must come within the rubric of an "other person" who has been injured.

The district court did not find it necessary to resolve the question of the Commonwealth's standing to sue in its personal capacity since it had held in a memorandum opinion of February 24, 1978 "that there was no show-

ing that the Commonwealth of Pennsylvania had been injured personally by the series of events alleged in the complaint . . . . " *Commonwealth of Pennsylvania v. Porter*, 480 F. Supp. 686, 694-95 (W.D. Pa. 1979). Thus, the district court, without addressing the status of the Commonwealth as an "other person", disposed of the Commonwealth's personal standing on an alternate ground: a failure to demonstrate injury. The district court's holding in this respect, however, was not critical to the continuation of the litigation because that court then allowed the action to proceed with the Commonwealth as a plaintiff under a *parens patriae* theory. We discuss this feature of the district court's holding in a subsequent section of this opinion.

Whether or not the Commonwealth may sue as a plaintiff under §1983, unlike the question of whether or not it may be sued as a defendant, does not require us to address considerations of Eleventh Amendment immunity. Our task is limited to determining whether Congress intended to include states among those "other person[s]" entitled *to bring* actions under §1983.

No Court of Appeals has had the occasion to address this question[6] but an examination of §1983 itself and a

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6. The question of whether a *municipality* is a proper §1983 plaintiff was considered and rejected by the Fifth Circuit in City of Safety Harbor v. Burchfield, 529 F.2d 1251 (5th Cir. 1976). Though that case was decided prior to *Monell*, the court reasoned that the "congressional concern in passing the Civil Rights Act [§1983] was to create a federal remedy for *private persons* seeking redress of violations of their civil rights." 529 F.2d at 1255 (emphasis supplied).

One district court has held simply that "[t]he state is not a " " " citizen of the United States or other person within the jurisdiction thereof " " " within the contemplation of 42 U.S.C. §1983." Buda v. Saxbe, 406 F. Supp. 399, 403 (E.D. Tenn. 1975) (footnote omitted, ellipsis in original).

Those district courts that have permitted the state to bring an action under §1983 have apparently done so on a *parens patriae* theory, as did the district court in this case. *See* discussion at n.9, *infra*.

review of the legislative history that was examined in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), leads to the conclusion that states were never deemed to fall within the class of those for whom Congress created a remedy when it enacted §1983.[7]

First, §1983 itself speaks of liability for "the deprivation of any rights, privileges, or immunities" brought about "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." By its terms, the statute offers redress to those who are injured under the color of state authority. Allowing a state to bring suit against its own instrumentalities and its own officers for their alleged violations of federal rights belonging to the very state which is suing, turns the statute on its head. "Representative Bingham, the author of §1 of the Fourteenth Amendment, for example, declared the bill's [the predecessor of §1983] purpose to be 'the enforcement . . . . of the Constitution on behalf of every *individual* citizen of the Republic.' . . ." (emphasis supplied, ellipsis in original, citation to Congressional Globe omitted). *Monell* at 685 n.45. And the *Monell* court in describing the function of §1983 quoted Representative Shellabarger describing the Act as providing "a civil remedy for . . .

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7. In Georgia v. Evans, 316 U.S. 159 (1942), the court cited United States v. Cooper Corp., 312 U.S. 600 (1941). In *Cooper*, the question was "whether, by the use of the phrase 'any person,' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act." 312 U.S. at 604. *Evans* stated:

> [t]he *Cooper* case recognized that 'there is no hard and fast rule of exclusion. The *purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.*'

316 U.S. at 161 (citation omitted, emphasis supplied).

all *people* where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship" (emphasis supplied, citation to Congressional Globe omitted). *Id.* at 683.

Certainly, the Commonwealth has the power to regulate conduct by its municipalities when that conduct infringes upon the constitutional rights of the Commonwealth's citizens. In addition, Congress has granted all citizens of this country a right to proceed against state and local officials, agencies, and municipalities for infringement of federally created rights. That is the obvious intendment and purport of §1983. But Congress has not gone so far as to provide in §1983 a similar statutory remedy of which the state can avail itself.

Thus, we are led to the conclusion that the remedy that Congress devised was explicitly designed to provide *individuals*, not states, with a means to secure their constitutional rights against the threat of governmental abuse.

Second, it must be remembered that here the Commonwealth seeks to enforce federal constitutional provisions and federal laws against *itself* because it is necessarily claiming that the violations of those provisions and laws came about under the color of its own statutes. To so hold, that the Commonwealth may sue in its personal capacity under this statute, we would be obliged to give §1983 the tortured reading we have just described. We decline to do so.

Moreover, the Commonwealth, in pressing this suit in its personal capacity, has turned away from its own courts and its own laws in seeking to enforce these purported rights. Of course, we do not suggest for one moment that the Commonwealth could bring this action in its own courts since we have determined that by the terms of §1983, a state is not included as a plaintiff "oth-

er person."[8] We observe only that it appears inappropriate and possibly disruptive of basic federal-state relations for a state to seek relief in a federal court under a federal statute not designed for such a purpose, when effective relief may be sought under its own laws in its own courts.

Having reached this conclusion we find it unnecessary to address the issue of whether the Commonwealth is an *injured* "other person" within the terms of the statute. We have earlier referred to the district court's conclusion that the Commonwealth could not attain plaintiff status in its personal capacity because it was not injured . *See* p. 10, *supra*. While we have no reason to disagree with that conclusion, we need not reach that issue in light of our holding that the Commonwealth cannot qualify as an "other person" under §1983.

We turn next to whether the Commonwealth may sue under §1983 in a representative capacity invoking the *parens patriae* doctrine.

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8. The Supreme Court's opinion in Allen v. McCurry, 49 U.S.L.W. 4015 (Dec. 9, 1980), discussed the prosecution of §1983 claims in state courts, and held that state courts were fully competent to adjudicate such claims and that their determinations were entitled to full collateral estoppel and *res judicata* effect.

The court wrote:

> As the Court has understood the history of the legislation, Congress realized that in enacting §1983 it was altering the balance of judicial power between the state and federal courts. But in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. The debates contain several references to the concurrent jurisdiction of the state courts over federal questions, and numerous suggestions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.

49 U.S.L.W at 4018 (citations and footnotes omitted).

B.

The most recent Supreme Court decision to discuss *parens patriae* is *Hawaii v. Standard Oil*, 405 U.S. 251 (1972). In that case the Court denied *parens patriae* standing to the State of Hawaii which had sought damages under the Clayton Act for harm to its general economy charging a violation of the antitrust laws. In tracing the development of the doctrine the court stated:

> The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal prerogative." These powers and duties were said to be exercised by the King in his capacity as "father of the country." Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. . . . In the United States, the "royal prerogative" and the "parens patriae" function of the King passed to the States.

(Footnotes and citations omitted.) *Id.* at 257.

The Court went on to explain that in the United States the nature of the *parens patriae* suit has been greatly expanded. It reviewed those cases in which *parens patriae* was properly invoked to prevent or repair harm to a state's "quasi-sovereign interest." *E.g., New York v. New Jersey*, 256 U.S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into New York harbor); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream). *See Hawaii v. Standard Oil*, *supra*, at 258.

The concept of *parens patriae* has also been addressed in this Circuit. This court's decision in *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), limited the state's right to bring *parens patriae* suits to two situations: either (1) where suit was brought "to protect [the State's] proprietary interests or (2) where suit was brought to protect 'quasi-sovereign' interests, such as the health, comfort and welfare of its citizens and general economy of the state." *Id.* at 22. Since, in the present case, unlike *Flood Insurers*, the Commonwealth has not alleged any harm to its own proprietary interests, the presence of *parens patriae* standing must turn on whether the Commonwealth has asserted a "quasi-sovereign" interest.

Flood Insurers defined a quasi-sovereign interest as "an interest of the State existing separate and apart from those injuries suffered individually by the State's citizens." *Id.* "What must be at stake is the State's independent interest, which generally arises from either (1) the State itself having suffered injury . . . or (2) the general public having suffered an injury so that no one individual has legal standing to sue. Under either circumstance, the *sine qua non* for the State, which sues in its *parens patriae* capacity, is that damage has occurred to its interest apart from the interests of particular individuals who may have been affected." *Id.* at 22.

Here the Commonwealth's interest has not been damaged apart from the interests of the particular aggrieved individuals. Yet, the Commonwealth here seeks relief that can only be sought, and indeed is being sought, by the individuals themselves.[9] It cannot, there-

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9. Two district court cases, in this Circuit, in addition to the district court opinion in the instant case, have held otherwise. In *Commonwealth of Pennsylvania v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974), the court simply held, without analysis, that racial discrimination damages "the state's quasi-sovereign interests — defined generally as the health and welfare of its citizens." *Id.* at 728.

fore, sue in its capacity as *parens patriae*, for it seeks "redress for injury to private parties, who being the real parties in interest, could themselves have prosecuted their own . . . claims." *Id.*

C.

Thus, we have concluded, contrary to the district court, that the Commonwealth cannot as a matter of law maintain this action to vindicate the rights of individual citizens as it had neither standing in its personal right, nor *parens patriae* standing. The district court therefore erred in providing relief for the Commonwealth predicated upon the Commonwealth's action which it brought as a plaintiff. Had the Commonwealth persisted in its original complaint, which named only the Commonwealth as a plaintiff, there would be no further need for discussion or decision, as the action would have failed. However, as we have recognized, the Commonwealth amended its complaint to add four individual plaintiffs whose actions continue.[10] Because there is no question as to the individual plaintiffs' standing to seek redress for the constitutional violations which they alleged and which the district court found, we must examine the extent to which, and against whom, they are entitled to relief.

In *Commonwealth of Pennsylvania v. Flaherty*, 404 F. Supp. 1022 (W.D. Pa. 1975), the court found the Commonwealth to be a proper party to challenge a discriminatory hiring practice. The court's discussion of standing was even more summary than *Glickman*.

10. Prior to trial, the district court had entertained substantial doubts as to Commonwealth's standing although it ultimately held, as we have noted, that the Commonwealth had standing as *parens patriae*. Nevertheless in ruling on the defendant's motion to dismiss, the court ordered that the Commonwealth's suit would be dismissed unless "within 20 days from the date of this order, individual citizens who have been deprived of their rights as set forth in the complaint join as party plaintiffs in this action." Thereafter, on March 24, 1978, an amended complaint was filed which added four individuals as plaintiffs. *See* n.1, *supra*.

III

The claims made by the three remaining individual plaintiffs[11] may be categorized as follows. As against police officer Baranyai, himself: the plaintiffs' claim that he had directly violated their constitutional rights by the unlawful actions to which they had been subjected. For instance, finding (12) recites:

> [Finding of Fact] (12) On November 16, 1974, defendant Baranyai brutalized and unlawfully assaulted and mistreated James Mages by beating him about the shoulders, arms, head and face with his fists and blackjack, by beating Mages' head against the wall, and by threatening to shoot him with a shotgun and revolver, all of which occurred while Mages was handcuffed and confined in the Millvale Police Station. We find that Mages was handcuffed during the time that the incident arose as the result of [the] unlawful arrest of one Walter Brightenbaugh without warrant.

480 F. Supp. 688-89.

As against the Mayor and Chief of Police: the individual plaintiffs assert that with full knowledge of Baranyai's activities, these individuals did not correct or supervise Baranyai's conduct and indeed they encouraged and ratified Baranyai's actions.

As against the individual members of the Council: the individual plaintiffs claim that the actions of Baranyai received support and ratification.

Because each of these claims are subject to varying legal standards and evidence, we are obliged to discuss them separately.

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11. The claims respecting Baumann, the fourth individual plaintiff, were dismissed by the district court apparently for failure of proof. 480 F. Supp. at 691 and 695.

A.

The defendants challenge the findings of fact made by the district court.[12] We have reviewed these findings in light of the evidence, and we cannot say that they are clearly erroneous. *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972). Indeed, our review of the record reveals that the findings with respect to Baranyai, the Mayor, and the police chief are more than amply supported by the evidence.

We note, for example, that the district court judge accurately depicted the evidence which led to his findings and to his granting of injunctive relief against Chief of Police Porter when he addressed Porter's acts of commission and omission. He found that Porter, despite having received complaints about Baranyai, never found fault with him. Nor had Porter sought to discipline Baranyai after Baranyai had been convicted in Criminal Court of malfeasance in office. Significantly, he found that Porter had retaliated against other fellow police officers who had testified or complained about Baranyai's conduct and that in all instances, Porter had publicly supported Baranyai. Other instances of support for Baranyai and of turning a deaf ear and blind eye to Baranyai's excesses are discussed in more detail in the district court's opinion, 480 F. Supp. at 691, 693, 701. We are satisfied that the evidence supports these findings.

Similarly, the evidence supports the findings made with respect to Mayor McCarthy's support of Baranyai and his lack of affirmative action to either suspend Baranyai, or to take any other action within his power

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12. Defendants Baranyai and Porter raise two additional points. They claim that the district court should not have considered evidence of incidents which occurred beyond the statute of limitations and that the district court erred in barring introduction of various plaintiffs' witnesses' arrest records. We have considered these contentions and find them to be without merit.

which might have resulted in curbing Baranyai's behavior. He, too, participated in retaliating against fellow officers who complained about Baranyai and although the Mayor had undertaken to investigate the complaints that were registered about Baranyai's conduct, the record supports the district court's finding that in most cases no report was made to the Council.

We are therefore satisfied that as respects Baranyai, in light of the evidence and the district court's findings, no legal barrier prevents relief being afforded to those plaintiffs whose rights he violated.

With respect to Chief of Police Porter, and to Mayor McCarthy, both of whom are, in effect, one step removed, other considerations become relevant.

To obtain relief against the police chief and Mayor, the requirements of *Rizzo v. Goode, supra*, must be satisfied. Thus, the officials' misconduct cannot be merely a failure to act. Such officials must have played an affirmative role in the deprivation of the plaintiffs' rights, *i.e.* there must be a causal link between the actions of the responsible officials named and the challenged misconduct. *Id.* at 375-77. As this court observed in *Lewis v. Hyland*, 554 F.2d 93 (3d Cir.) *cert. denied* 434 U.S. 931 (1977), *Rizzo* "was aimed at the failure of plaintiffs to prove the existence of an unconstitutional policy or plan adopted and enforced by the official defendants. Throughout, the Court emphasized the complete absence of any causal link between the individual police officers' conduct and the responsible authorities. Mere invocation of the words 'pattern' or 'plan' did not suffice without this causal link." *Id.* at 98.

Here, however, unlike either *Rizzo* or *Lewis*, the district court has made findings, which are not clearly erroneous, that there was a causal connection between Baranyai's pervasive pattern of constitutional misconduct and the Mayor's and police chief's ratification of those actions. The district court expressly found:

> We further find that the Mayor and Chief of Police, defendant Porter, have to a large extent aided, abetted, confirmed and ratified the conduct of the defendant Baranyai and in many cases have instigated the conduct complained of and have threatened and harassed citizens who were bold enough to make complaints as to this course of action.

480 F. Supp. at 693. This finding, as we have noted, is amply supported by the record and more than suffices to satisfy the requirements established by *Rizzo* and *Lewis*.

Such is not the case, however, with respect to the past and present members of the Millvale Borough Council. The district court refers only to two official acts of the Council as demonstrating that it "has . . . taken an active part in the Baranyai affair." *Id.* at 702.

The first act to which the district court referred is the Council's adoption of a resolution on July 12, 1977 (Plaintiff's Ex. 15) which the district court characterized as "supporting Baranyai". The second act of the Council, to which the district court made reference, occurred on February 14, 1978 (Plaintiff's Ex. 12) when the Council adopted another resolution which the district court read as providing support to Baranyai. The conclusions drawn from these resolutions and from "the evidence" led the district court to hold that: (1) complaints to the Borough Council were useless and (2) that the Council had "failed to make any investigation or take any steps towards removing or suspending" Baranyai. 480 F. Supp. at 702.

We have examined the resolutions and we have reviewed the evidence and do not read the record in the same manner as the district court. For example, as we read the record, it does not reveal intentional acts (such as retaliation against witnesses) taken by the defendant Council members to further Baranyai's unlawful conduct. It appears to us that the "support" to which Finding of

Fact (41)[13] is addressed, refers not to support of illegal acts, but rather to "support" of Baranyai as a person.

As we understand *Lewis* and *Rizzo*, the Council members' actions, unlike those of Porter and McCarthy, fell within the category of actions that under *Lewis* do not constitute grounds for injunctive relief. *Lewis* held that a "mere '*failure* to act [by responsible authorities] in the face of a statistical pattern' was found to provide no basis for injunctive relief." 554 F.2d at 98 (emphasis and bracketed material in original, footnote omitted). And while we do not face inaction in the face of a *statistical* pattern in this case, *Lewis* also held that no evidence of the essential causal link existed where there was no more than "an unfortunate insensitivity on the part of responsible officials toward reports of abuses . . .." *Id.* at 101.

Thus, while the evidence reveals that the Mayor and police chief actively supported and indeed encouraged Baranyai's conduct, the Council members' official actions constitute no more than inaction and insensitivity.[14] The Council resolutions did no more than "give Officer Baranyai [the council's] support[,] [p]rovided that [it] is agreeable with the Borough Solicitor upon his re-

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13. Finding of Fact (41) reads:

> Although defendants have been aware of allegations of police misconduct and abuse by defendant Baranyai and although defendant Baranyai was convicted of said misconduct and abuse in the Allegheny County Court of Common Pleas, Criminal Division, defendants have taken no action whatsoever to end or otherwise deter the illegal conduct by defendant Baranyai. Defendants did support defendant Baranyai's illegal conduct and took official action in this regard on July 12, 1977, and February 14, 1978.

480 F. Supp. at 691.

14. The district court's other findings reveal only that the Council had heard complaints against Baranyai at "numerous regular monthly meetings . . . since August 13, 1974." 480 F. Supp. at 691.

view of the facts of the charges." (Pl. Ex. 15). Seven months later the Council passed a "motion to continue to support Officer Frank Baranyai." (Pl. Ex. 12) after he had been convicted of three misdemeanor counts in a state criminal prosecution based on many of the same incidents underlying the district court decision in this case.

This evidence does not satisfy the threshold requirements of *Rizzo* and *Lewis*. Nor in our review of the record have we discovered other evidence which is sufficient to warrant treating the Council members in the same fashion as the other defendants.

In this connection, we are in addition troubled by the change in composition of the Borough Council. The record discloses that only one of the Council members (Lawson) named as a defendant was in office at the time of argument, and he tried to have Baranyai removed as a police officer. His term has since expired. Two Council member defendants had completed their service in 1977, and two new Council members are not named as defendants. As we read the record, therefore, none of the seven named Council members would be appropriate defendants in an action seeking injunctive relief unless they had been reelected — a subject upon which the record is silent. Thus, to the extent that the plaintiffs have the burden of proving that injunctive relief is appropriate as to the named defendants, they have not met this burden. Indeed, *Lewis* held when "none of the incidents proved . . . occurred under the regimes of the *incumbent* 'responsible authorities,' " that "any link between responsible officials and the incidents of abuse is necessarily more attenuated . . . ." 554 F.2d at 101 (emphasis supplied). Accordingly, as to the members of the Council, we are satisfied that, measured by this record, the *Rizzo* and *Lewis* standards have not been met. The injunction to the extent it is imposed on these defendants must be vacated.

This leaves for consideration the scope of the injunction itself, and the question of whether in light of our rulings, further proceedings are necessary.

IV

We have held thus far that the Commonwealth was not a proper party and that as a plaintiff to this action the Commonwealth should have been dismissed. In that respect, we will reverse the district court which ruled otherwise.

We have also held that the district court's Findings of Fact with respect to defendant Baranyai and with respect to Chief of Police Porter and Mayor McCarthy are not clearly erroneous and are supported by the record. We have found no error in those findings nor in the liability determinations which follow from those findings. Accordingly, in these respects, we will affirm the district court.

Having determined, however, that the evidence against the Borough Council members does not meet the test for liability established by *Rizzo*, we will reverse the district court's determination of liability as to the Council members and will direct that the district court's injunction be vacated insofar as it enjoins the Council members.

The district court had refused to certify a class because it deemed the Commonwealth's status sufficient to represent all the citizens of Pennsylvania. Thus, it was that the district court found:

> [Finding of Fact] (4) Individual plaintiffs are citizens of the United States and the Commonwealth of Pennsylvania and bring this action on their own behalf and on behalf of all persons residing in or otherwise lawfully in the Borough of Millvale and all persons who will in the future reside in or lawfully be in the Borough of Millvale. The court, however, re-

fused to certify a class action, relying on the Commonwealth to represent the class.

480 F. Supp. at 688.

However, we have held in this opinion that the Commonwealth is not a proper party. This holding, together with our determination that the individual Council members may not be enjoined, raises a number of questions with respect to the district court's injunction.

First, the district court in framing paragraph 4 enjoined all defendants from "further engaging in [unconstitutional] conduct . . . or participating in violations of this injunction by Baranyai." Obviously, the district court intended this injunction to operate against the Borough Council members. But, as we have held, not only does the record fail to support this injunction, more significantly the membership of the Council is no longer the same. These circumstances raise serious questions apart from issues of overbreadth, as to the implementation of this portion of the decree.

Second, the first segment of paragraph 5 of the injunctive order apparently enjoins all of the defendants from employing Baranyai. This segment obviously suffers from the same defect as paragraph 4 insofar as it pertains to the Council member defendants. Moreover, because the Pennsylvania Borough Code apparently vests the authority in the Borough Council to remove borough policemen, only the current members of the Council, who are not named as defendants, have the capacity to comply if indeed the individual members, as distinct from the Council as an entity, may so act.[15]

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15. We cannot tell from this record whether Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), was considered by the plaintiffs during the prosecution of this action. We observe only that *Monell* which permits actions against municipalities under §1983 was decided by the Supreme Court after the amended complaint was filed here.

The second segment of paragraph 5 which enjoins Baranyai from serving as other than an unarmed desk policeman appears to be inconsistent with the earlier direction that he not be employed at all. It can however, depending upon its punctuation, be read consistently so as to provide that all the defendants are enjoined from employing Baranyai as other than an unarmed desk officer, and Baranyai is enjoined from serving as other than an unarmed desk officer. In favoring this latter construction which avoids an improbable internal inconsistency, another question is raised as to the Council members' authority to assign or reassign police officers to particular duties under the Pennsylvania Borough Code. Whatever the correct interpretation may be, it is unquestionable however, that the injunctive order must involve the exercise of the Mayor's delegable powers under the Pennsylvania Code and the assignment to particular duties by the Mayor and/or police chief. This in turn implicates the constitutional principles referred to by the district court in its discussion of "Remedies", 480 F. Supp. 703-04. The district court held the injunctive relief which it provided would not interfere with the daily internal workings of the police department in accordance with the teachings of *Rizzo*, 480 F. Supp. 704. However, the district court reached that conclusion only after it had found *all* the defendants liable and therefore subject to injunction. As we have pointed out, however, the defendant members of the Council may not be enjoined, thereby casting some doubt on what injunction would have been imposed had the district court not found them liable.

Third, in addition to the problems presented by the terms of the district court's injunction and the circumstance that the Council members are outside its operation, another substantial issue must be considered. Our ruling that the Commonwealth should have been dismissed leaves open the question whether the three indi-

vidual plaintiffs are entitled to the relief they seek without class certification and if not, whether a class should be certified.

We are mindful of the arguments made by the plaintiffs that the district court's injunction can be sustained and enforced without the need to certify a class. However, it has been recognized that enforcement in such a situation would be problematic.[16] Indeed, at oral argument, counsel for the individual plaintiffs conceded that "it would be premature for this Court to issue a decree or either affirm or modify the lower Court's ruling without considering the question of whether there is a proper class." (Tr. at 72.)

At the time that the plaintiffs made their argument, however, they could not have anticipated our rulings that the Commonwealth had no standing and that the members of the Council could not be enjoined on this record. Because of the interrelationship of these factors, it appears to us that additional proceedings before the district court must be had.

It is for the district court in the first instance to resolve the question of whether a class should be certified and if so, its contours. It is also for the district court to reconsider in light of our rulings and discussion, the form that its injunctive order should now take. In light of these considerations, we are exceedingly reluctant to formulate a remedy at this level. Since we must in any event remand to the district court to implement the rulings we have made and since it appears advisable to have the district court deal with all the issues remaining open, and to frame the injunctive order on an appropriate record, it is that court which should consider these issues in the first instance.

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16. The amici, the American Civil Liberties Union and the Greater Pittsburgh Chapter of the American Civil Liberties Union, stated as much in their supplemental letter memorandum.

In conducting these proceedings, if the district court deems that it requires supplemental hearings and a supplemental evidentiary record, it is free to order them in its discretion. We do no more than identify the areas where we are either unable to resolve the issues presented or believe it inappropriate for us to do so. In identifying these concerns, we expressly decline to indicate our views as to how they should be resolved.

Additionally, even though we have ordered the dismissal of the members of the Borough Council, as defendants in this action, because the present record does not support relief against them, we recognize that in the proceedings which the district court will now be obliged to hold, it may be necessary for the district court to require actions to be taken by the Council. Nothing that we have said with respect to the named Council members and the unavailability of injunctive relief against them on this record, will prevent the district court from fashioning adequate relief with respect to proper parties, *see, e.g.*, n.15, *supra*, if in its findings and discretion it holds such relief to be appropriate. Nor do we restrict the plaintiffs from either seeking to supplement to record or from attempting to restructure their action in light of this opinion, subject always to the district court's discretion.

In the interim, to preserve the *status quo*, the injunction, to the extent that it is still viable and as it is presently modified,[17] will be continued and will remain

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17. We have noted earlier in the factual recital that the original injunction was modified twice. The first modification, by another district court judge, stayed paragraph 5. That stay was granted

> only as to paragraph 5 of the Order of Judge Knox dated November 16, 1979, conditioned upon the filing of a [sic] approved surety bond in the amount of $10,000.00, by defendant Frank L. Baranyai, payable to the Commonwealth of Pennsylvania for the use of all interested parties, and conditioned that defendant, Frank L. Baranyai shall keep the peace and comply with all other provisions of the Order of November 16, 1979. This

in effect until such time as the district court enters its final order and injunction consistent with this opinion.

V

Accordingly, the district court's order having been affirmed in part and reversed in part, the case will be remanded to the district court for further proceedings consistent herewith.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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Order is entered upon consultation with Judge William W. Knox, the trial Judge to whom this case is assigned.

IT IS FURTHER ORDERED that all other provisions of the Order dated November 16, 1979 are to remain in full force and effect.

Thereafter the defendants apparently moved for a stay of the district court's order before a single judge of this court. Judge Aldisert of this Court took no action other than to permit a substitution in the obligor from Baranyai to the Borough of Millvale. His order which was dated November 20, 1979 reads as follows:

The stay of paragraph 5 of the district court's order previously entered by the district court this date is modified to the limited extent of permitting, in lieu of a surety bond or cash in the amount of $10,000, a bond or obligation of the Borough of Millvale, Pennsylvania, conforming with that set forth as Exhibit "A" attached hereto and made part hereof.

This modification shall remain in effect until consideration of the premises by a panel of this court or until further order of this court.

9. The Court observed the plaintiff and his two witnesses. All of them are convicted felons and in the opinion of this Court their testimony is not believable. Their testimony is contradictory. Even two of the plaintiff's inmate witnesses agreed that blankets and mattresses were in the jail and that toilet paper, food, and showers were normally furnished at the jail. The jailer who originally was a defendant and is now deceased was at the jail every day, but the Court does not believe that the sheriff had occasion to discuss the plaintiff's complaints with him on four or five occasions. The sheriff testified that he was not aware of any complaints by the plaintiff and that he saw the plaintiff on one occasion when he was heading in the direction of the shower but that he did not see him take a shower.

CONCLUSIONS OF LAW

[1] 1. This Court has jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. In order for a plaintiff to recover from a sheriff, he must show that the defendant sheriff had actual knowledge of the complaints which the plaintiff has. There is no such showing in this case.

[2] 2. While the sheriff is responsible for running the jail under the provisions of the Missouri statute, Section 221.020, R.S.Mo. (1969), this plaintiff has shown no actual damage as a result of his treatment.

3. Judgment will be entered in favor of the defendant, Sheriff Jack Houser, and against the plaintiff, Frankie Tatum, and this cause will be dismissed with prejudice.

COMMONWEALTH OF PENNSYLVANIA, Richard W. Baumann, Joseph Blume, James Mages and Bernard Peitz, Jr.

v.

James D. PORTER, Chief of Police, Frank L. Baranyal, Police Officer, Regis J. McCarthy, Mayor, Carl Seidl, President of Council, Maurice P. Bedel, Sr., James Beran, John L. Cavanaugh, Jerry Dawson, James H. Lawson and Stephen Mikus, Members of Council, all of the Borough of Millvale.

Civ. A. No. 77-1164.

United States District Court, W. D. Pennsylvania.

Nov. 16, 1979.

Commonwealth of Pennsylvania and individual citizens brought civil rights action against policeman and borough officials alleging repeated civil rights violations. The District Court, Knox, J., held that policeman who committed repeated violations of citizens' civil rights and mayor, chief of police and borough council who instigated, acquiesced in, or ratified such violations would be permanently enjoined from participating in or encouraging future deprivations of civil rights.

Order accordingly.

1. Civil Rights ⇐13.4(2)

Holding of *Rizzo v. Good* restraining a federal court from mixing in state affairs had no application to civil rights action involving individual policeman in small borough police force in small municipality, so as to preclude district court from vindicating rights of citizens. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.6

Commonwealth of Pennsylvania had standing to bring civil rights suit against policeman and borough officials alleging repeated civil rights violations in order to protect constitutional rights of Commonwealth's citizens. 42 U.S.C.A. § 1983.

Exhibit "C"

3. Civil Rights ⇐13.13(2)

In civil rights suit against policeman and borough officials alleging repeated civil rights violations, evidence of civil rights violations which occurred more than two years prior to initiation of action was admissible in order to show motives, intent, preparation, purpose, knowledge or absence of mistake or accident, plan or design and also to show pattern or routine practice of defendants, in spite of applicability of Pennsylvania two-year statute of limitations. 42 U.S.C.A. § 1983; Fed.Rules Evid. Rules 404(b), 406, 28 U.S.C.A.; 12 P.S.Pa. § 51 (Repealed).

4. Searches and Seizures ⇐3.3(1)

Where police received information over radio about telephone call from unknown informant saying that a party and disturbance were going on at certain residence and no noise or disturbance was audible at residence and no neighbors in the immediate vicinity were complaining, there was no justification for entering and searching house.

5. Arrest ⇐63.1

A warrantless arrest is justified only where there is a breach of peace which endangers property and safety of any person present.

6. Civil Rights ⇐13.4(2), 13.16

Repeated violations of civil rights by borough policeman gave rise to cause of action under civil rights statute and subjected policeman to equitable relief. 42 U.S.C.A. § 1983.

7. Criminal Law ⇐1213

Where application of force by police officer exceeds that which is reasonable and necessary under circumstances and also violates standards of decency more or less universally accepted, it amounts to "cruel and unusual punishment." U.S.C.A.Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights ⇐13.4(2)
Criminal Law ⇐1213

Where light blows are administered by a police officer, they may be considered a mere tort under state law and not subject to suit under civil rights statute; however, conduct and manner of administering blows may constitute "cruel and unusual punishment." 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8.

9. Criminal Law ⇐1208(4)

A sentence of outlawry is not authorized for even a trial court of general jurisdiction.

10. Constitutional Law ⇐83(1)

Policeman's conduct in ordering citizens not to return to community constituted violation of constitutional rights of citizens to move freely within confines of country.

11. Municipal Corporations ⇐594(1)

Borough antiloitering ordinance, as interpreted by individual police officer resulting in false and baseless arrests of various citizens, was unconstitutional.

12. Civil Rights ⇐13.16

Police officer, chief of police, mayor and borough council were permanently enjoined from participating in or acquiescing in future violations of civil rights by police officer. 42 U.S.C.A. § 1983.

Michael Loulk, Paul D. Boas, Pittsburgh, for petitioners.

Daniel J. Weis, Alfred C. Maiello, Bruce E. Dice, Pittsburgh, for defendants.

OPINION

KNOX, District Judge.

A. Introduction.

In this case involving claims of repeated violations of civil rights contrary to 42 U.S.C. § 1983 by Frank L. Baranyai (Baranyai) a policeman of the Borough of Millvale, Allegheny County, Pennsylvania, the court sitting non-jury has heard testimony over a period of 14 days. It is also claimed that Regis J. McCarthy (McCarthy), Mayor

of Millvale and James D. Porter (Porter), Chief of Police have instigated, acquiesced in, or ratified these violations and hence are named as defendants. The president and members of the Borough Council are also defendants, it being asserted that they were aware of Baranyai's conduct, took no action and supported him.

At the conclusion of the trial on May 10, 1979, the court dictated a memorandum as to the proceedings on the record with tentative findings in favor of the plaintiff on 22 incidents and in favor of the defendants on 11 incidents.

The parties were directed to file briefs with respect to these matters as well as other questions of law involved including the relief, if any, to be granted. Arguments on the merits were scheduled for June 27, 1979, but had to be postponed twice because of scheduling problems. They were finally held August 21, 1979, with additional materials being submitted at later dates. The court is now prepared to adjudicate the matter and enters the following:

B. Findings of fact.

(1) This is an action brought by the Commonwealth of Pennsylvania and individual plaintiffs to enjoin defendants from engaging in a pattern of practice which denies citizens lawfully in the Borough of Millvale their constitutional rights to be free from physical violence, mistreatment, threats, harassment, illegal detention, illegal arrest, illegal searches and seizures, and other unconstitutional conduct.

(2) Plaintiffs allege that defendants have engaged and are engaging in a continuing course of unconstitutional police misconduct and abuse.

(3) Plaintiff Commonwealth of Pennsylvania brings this action on its own behalf and on behalf of its citizens, including the residents of the Borough of Millvale and all others who may lawfully be in Millvale.

(4) Individual plaintiffs are citizens of the United States and the Commonwealth of Pennsylvania and bring this action on their own behalf and on behalf of all persons residing in or otherwise lawfully in the Borough of Millvale and all persons who will in the future reside in or lawfully be in the Borough of Millvale. The court, however, refused to certify a class action, relying on the Commonwealth to represent the class.

(5) Defendant Frank L. Baranyai is and was a police officer employed by the Borough of Millvale at all times here involved.

(6) Defendant James D. Porter is employed by the Borough of Millvale as Chief of Police and has served in said capacity at all times relevant to this action.

(7) Defendant Regis J. McCarthy serves as Mayor of the Borough of Millvale and has served in said capacity at all times relevant to this action.

(8) All other defendants are present or past members of the Millvale Borough Council.

(9) The Borough of Millvale is a municipality incorporated as a Borough pursuant to the laws of the Commonwealth of Pennsylvania.

(10) The Borough of Millvale has established and maintains a police department pursuant to the Borough Code, 53 P.S. § 45101, et seq.

(11) On November 6, 1974, defendant Baranyai unlawfully arrested and detained Margaret G. Blume while she was lawfully standing on a street corner in the Borough of Millvale. While defendant Baranyai claims that Mrs. Blume, a woman in her late forties was dressed as her daughter Judy for the purpose of entrapping him into making false arrest, nevertheless, he concedes that he recognized her as the mother when she turned around. He packed her into the police car and took her to the station. The mother is much heavier set than the daughter.

(12) On November 16, 1974, defendant Baranyai brutalized and unlawfully assaulted and mistreated James Mages by beating him about the shoulders, arms, head and face with his fists and blackjack, by beating Mages' head against the wall, and by threatening to shoot him with a shotgun

and revolver, all of which occurred while Mages was handcuffed and confined in the Millvale Police Station. We find that Mages was handcuffed during the time that the incident arose as the result of unlawful arrest of one Walter Brightenbaugh without warrant.

(13) On July 10, 1975, defendant Baranyai beat and unlawfully assaulted and mistreated Richard Stefanick by striking him about the face and head with a flashlight while Stefanick was in his custody and control. The court does not condone Stefanick's prior conduct or hold the arrest was illegal, but this forms no legal basis for the beating after he was secure.

(14) On May 24, 1976, defendant Baranyai brutalized and unlawfully assaulted and mistreated Daniel Burchill by beating Burchill with a nightstick across the ribs while Burchill was handcuffed and in his custody and control. This attack was corroborated by Officer Cepek.

(15) On June 18, 1976, defendant Baranyai beat and unlawfully assaulted and mistreated Richard Stefanick with a blackjack while Stefanick was in his custody and control in the Etna Police Station. At the hospital where he was taken, edema and contusions about the face were found consistent with blows by a blackjack.

(16) On June 22, 1976, defendant Baranyai beat and unlawfully assaulted and mistreated Patrick Hughes by striking him about his arms and stomach with a nightstick while Hughes was in his custody and control in the Etna Police Station. The court finds the blows struck on the street did not constitute excessive force but the attack in the police station, verified by two other officers did.

(17) On January 29, 1977, defendant Baranyai unlawfully harassed and mistreated Franz J. Hersick by stopping his automobile, pulling Hersick out of his car, unlawfully arresting and detaining him in a cell and causing an illegal search to be made of Hersick's car. Hersick was refused the right to use the telephone to call his attorney and his car was unlawfully searched without warrant.

(18) On March 25, 1977, defendant Baranyai beat and unlawfully assaulted and mistreated David Stier and banged Stier's head against the pavement while taking him into custody. He had been subdued but Baranyai persisted in banging his head on the pavement and threatening to split his skull open. This was verified by testimony of a bystander. The force was excessive and might have resulted in a fractured skull.

(19) In November, 1977, defendants subjected Franz J. Hersick to unlawful retaliation, harassment and intimidation because he had complained of police misconduct and abuse by defendant Baranyai. He was entrapped by defendant Porter into going to the office of defense counsel Dice and there interviewed without his attorney. Attempts were made to get him to change his statement and Porter threatened him with suit for complaints against Baranyai.

(20) On March 15, 1978, and on various other dates, defendant Baranyai subjected Patrick Hughes to unlawful retaliation, harassment and intimidation because he had complained of police misconduct and abuse by defendant Baranyai. Hughes was told to get out of Millvale and stay out. This was corroborated by another officer and Baranyai claimed a right to tell persons selected by him to stay out of Millvale.

(21) On July 12, 1977, defendant Baranyai subjected Joseph Blume to unlawful arrest, retaliation, harassment and intimidation because he had complained of police misconduct and abuse by defendant Baranyai. He was attacked and punched, refused leave to use the telephone and not informed of charges against him. The court finds his repudiation of his complaint to Mayor McCarthy was made under compulsion by Baranyai.

(22) On April 12, 1978, shortly after the incident described in 20 defendant harassed Joseph Blume and wife eating a milkshake. He followed them and told them to stay out of Millvale. Blume is afraid to go into Millvale for fear of arrest.

(23) On November 17, Bernard Pietz was summoned to the police station in Millvale

by defendant Porter who yelled and shouted at him in attempt to intimidate him in connection with his giving testimony against Baranyai in a criminal trial about to commence in the Court of Common Pleas. He was threatened with suit if Baranyai was acquitted.

(24) On July 4, 1978, defendant Baranyai unlawfully arrested and detained Kimberly Urbanek, a Clerk of the County Court Reporters while she was lawfully standing on a sidewalk in the Borough of Millvale. She was taken to the police station and cited. Charges of loitering in violation of state law were dismissed by the Court of Common Pleas.

(25) On an unknown date, defendant Baranyai brutalized and otherwise mistreated Robert Angel by beating him with a blackjack while Angel was in his custody and control. This was verified by Sergeant Pfeiffer. On remonstration by Pfeiffer who was in charge Baranyai replied: "No one interferes with my arrests or tells me what to do."

(26) On March 2, 1979, defendant Baranyai unlawfully arrested and detained Gilbert R. Gruemken, Jack Dorn and Tom Newman while they were lawfully standing on a street corner in the Borough of Millvale. The court finds he stopped his police car, made them get in and took them to the police station without giving any reason.

(27) On March 15, 1979, defendant Baranyai arrested John Ayres, age 11, while he was lawfully upon the streets of the Borough of Millvale and further unlawfully detained and mistreated John Ayres while John was in his custody and control in the Millvale Police Station. The boy had kicked another boy without injury while emerging from a school bus. He was placed in a police car, taken to the station and interrogated concerning another incident without *Miranda* warnings and without calling his parents. He was threatened with Juvenile Court. On cross examination, it developed Baranyai did not regard this as an arrest.

(29) On March 30, 1979, defendant Baranyai unlawfully without warrant entered the home of Katy M. Nist and John J. Nist located in Reserve Township, and he did unlawfully conduct a search of the premises, of various personal belongings and of various individuals therein. The householder demanded a warrant and Baranyai responded he didn't need a warrant. There was no probable cause for the entry, the same being based upon a telephone call from an unknown informant broadcast over the radio. No known neighbors complained and no noise was audible on the sidewalk.

(30) On March 30, 1979, defendant Baranyai unlawfully ordered Jack Dorn to remove himself from the front steps of a Millvale resident's home or be arrested. The householder stated he had no objections to Dorn sitting on the steps.

(31) On July 14, 1977 and July 18, 1977, criminal complaints were filed in Allegheny County, Pennsylvania, against defendant Baranyai specifically alleging numerous of the incidents set forth above.

(32) On February 8, 1978, after a jury trial in the Allegheny County Court of Common Pleas, Criminal Division, defendant Baranyai was found guilty of one count of Simple Assault (18 Pa.C.S.A. § 2701), and two counts of Official Oppression (18 Pa.C.S.A. § 5301). The conviction of Simple Assault and one of the counts of Official Oppression arose from the criminal complaint filed by David Stier. The other count of Official Oppression arose from the complaint filed by Deputy Attorney General, Michael Louik, wherein Baranyai was accused of a pattern of misconduct and abuse beginning in the Summer of 1973.

(33) On June 26, 1978, defendant Baranyai was sentenced to pay a fine of $1,000, two years probation and to pay the court costs. This case is now on appeal. The affirmance or not of the convictions is of no importance here because in that case the Commonwealth was required to prove guilt beyond a reasonable doubt while here we are only concerned with preponderance of the evidence.

(34) At no time during the criminal proceedings against defendant Baranyai was he ever suspended, reprimanded or other-

wise disciplined by the other defendants. At no time whatsoever has defendant Baranyai ever been suspended, reprimanded or otherwise disciplined for any of the matters alleged in this action.

(35) On October 5, 1977, the complaint in this action was filed. Two days later on October 7, 1977, defendant Baranyai filed criminal charges against Deputy Attorney General Michael Louik, one of the attorneys herein, charging him with Barratry (18 Pa. C.S.A. § 5109) and harassment (18 Pa.C.S.A. § 2709). Said charges were filed against Deputy Attorney General Louik in his official capacity and alleged, among other things, criminal violations arising from the institution of this action. In February, 1978, defendant Baranyai withdrew these criminal charges.

(36) On the second day of the trial of this case in the hallway immediately outside the courtroom in which this case was being tried, the defendant Baranyai pointed out one of the attorneys for the plaintiffs and described him as representing the Mafia. This was in the presence of witnesses for the plaintiff who testified they felt harassed and intimidated. The defendant claimed he was unaware these were plaintiffs witnesses but admitted he had made similar statements previously. The court finds this is typical of defendant's conduct in attempting to harass witnesses and attorneys who bring proceedings against him. The court finds this is some evidence of consciousness of guilt.

(37) The other defendants have been aware of allegations of police misconduct and abuse by defendant Baranyai since at least April 13, 1974.

(38) Complaints regarding misconduct and abuse by defendant Baranyai were heard at numerous regular monthly meetings of Millvale Borough Council since August 13, 1974.

(39) Neither defendant Porter nor defendant McCarthy ever conducted a meaningful investigation or other inquiry to determine whether or not allegations regarding police misconduct and abuse by defendant Baranyai were true. Any investigations made were purely perfunctory going no further than asking Baranyai if the charges were true.

(40) Defendants Seidl, Bedel, Beran, Cavanaugh, Dawson, Lawson, and Mikus, members of the Borough Council, never conducted any investigation or other inquiry to determine whether or not allegations regarding police misconduct and abuse by defendant Baranyai were true. Beran did protest against the failure to investigate and was subjected to a personal attack by defendant Porter. Lawson also protested. Their protests were voted down.

(41) Although defendants have been aware of allegations of police misconduct and abuse by defendant Baranyai and although defendant Baranyai was convicted of said misconduct and abuse in the Allegheny County Court of Common Pleas, Criminal Division, defendants have taken no action whatsoever to end or otherwise deter the illegal conduct by defendant Baranyai. Defendants did support defendant Baranyai's illegal conduct and took official action in this regard on July 12, 1977, and February 14, 1978.

(42) Defendant Baranyai was convicted of criminal offenses involving police misconduct and abuse, and yet he continues to engage in said unconstitutional conduct with the knowledge, approval and participation of the other defendants and said unconstitutional conduct is likely to continue in the future, unless the situation is remedied by this court.

(43) With respect to the remaining incidents complained of by the plaintiffs, the court finds for the defendant, either because no evidence was submitted in support of the complaint or because the court finds that the plaintiff's case with respect to such complaints was not established by the preponderance of the credible evidence. These items are as follows (Numbering is from list of incidents contained in plaintiff's preliminary proposed findings of fact submitted May 11, 1979 and used by both parties throughout the trial of this case): 14. Unknown resident of Millvale, 15. Arthur, 16.

Bowman, 17. Peitz, 19. Thomson, 22. Zurcher, 25. Goetz, 27. Stefanick, 28. Thomas Brown, 29. Duffy, 30. Stefanick, 36. Robert Myers, (The court finds as to Myers that force was used, but it was only sufficient force necessary to subdue an unruly drunken prisoner), 37. Newman, 41. Eileen Ayres, 42. Unknown resident of Millvale, 45. Marta Dorn.

(44) The court also finds against the plaintiffs and in favor of the defendants with respect to the matter of Kevin Walsh and Mark Miller the subject of the matter heard on petition for additional hearing and additional proposed finding of fact. The court finds that in this instance, the preponderance of the evidence is in favor of the defendants.

C. Discussion.

Gilbert and Sullivan many years ago pointed out: "When constabulary's duty's to be done, the policeman's lot is not a happy one." [1]

The truth of this observation comes home here where we have a case largely centered against one police officer, a member of a small borough police force, who has had some training and has demonstrated zeal and initiative in the performance of his duties. It is inevitable that in the performance of his duties a policeman of this type should meet with resistance and become the subject of vilification. We have made due allowance for this with respect to certain incidents complained of, finding that the weight of the evidence is with the defendant.

We do find, however, that in a large number of incidents as set forth in the findings of fact, supra, the defendant Baranyai has engaged in a pattern of practice denying citizens residing in and otherwise lawfully in the Borough of Millvale, Allegheny County, their rights to be free from physical violence, mistreatment, threats, harassment, illegal detention, illegal arrest and illegal searches and seizures. If we were confronted with only a single isolated incident charged against defendant Baranyai, we would relegate the individual plaintiff to a suit for damages under the Civil Rights Act. We do, however, find that there is a long continued pattern of misbehavior which justifies the intervention of the equitable powers of this court in an endeavor to protect citizens from further mistreatment of the type outlined. In other words, we find Baranyai, in many instances, is too zealous in the performance of his duties and resorts to excessive force. There are several incidents here of illegal arrest of citizens whose only offense was standing on a sidewalk in the Borough of Millvale. Other people have been beaten as demonstrated by testimony of the third parties and corroboration by doctors at hospitals. In many instances, he seems to derive satisfaction from such a course of conduct, taking prisoners who are already secure, in custody and handcuffed with their hands behind their back to a place in the basement of the Millvale Police Station where he "works them over" with a blackjack or nightstick. We cannot tolerate misconduct of this kind.

The U.S. Supreme Court has recently said with respect to the rights of citizens in this respect in *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977):

> "The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protections against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men'. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923); see *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.

1. Gilbert & Sullivan "The Pirates of Penzance" (1880).

"While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. See *Rochin v. Calif.*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396 (1952). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

"This constitutionally protected liberty interest is at stake in this case. There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."

The Supreme Court notes that under our Constitution, we are entitled to at least the protection against governmental power which the colonists had previously enjoyed as Englishmen against the power of the Crown. The language in *Ingraham v. Wright*, is an echo of the words of Magna Carta laid down in the year 1215 in an attempt to curb the arbitrary exercise of power by the king.[2]

Our Civil Rights Act, 42 U.S.C. § 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

We have noted the Mayor and Borough Council of the Borough of Millvale have been aware of the conduct of the defendant Baranyai at least from the year 1975 to the present date and have made no adequate investigation of the complaints made to them or made at Council meetings. Any investigation conducted by the Mayor or Chief of Police was a perfunctory investigation only involving merely asking the defendant Baranyai whether he had engaged in the conduct complained of. No attempt was made to interview the citizens and to determine whether there were witnesses to support their complaints.

We further find that the Mayor and Chief of Police, defendant Porter, have to a large extent aided, abetted, confirmed and ratified the conduct of the defendant Baranyai and in many cases have instigated the conduct complained of and have threatened and harassed citizens who were bold enough to make complaints as to this course of action.

The findings of fact alone should be sufficient to justify equitable intervention. The complaint merely asks for a preliminary and permanent injunction prohibiting defendants from subjecting the residents of Millvale and other persons lawfully in Millvale to unconstitutional physical violence, mistreatment, threats or harassment and from unconstitutional detentions, searches, seizures, arrests and imprisonment. We are not asked to award damages to any individual plaintiff but only to take steps by way of injunctive relief to protect the citizens from this course of conduct in the future. We will, however, discuss certain legal questions which present themselves in this case.

(1) The *Rizzo* case.

The defendants originally moved to dismiss this case alleging that the court had no power to interfere with the operations of the police force in the Borough of Millvale, Allegheny County under the decision of the

2. "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. (2) We will sell to no man, we will not deny or defer to any man either Justice or Right."

U.S. Supreme Court in *Rizzo v. Good*, 423 U.S. 362, 96 S.Ct. 598, 26 L.Ed.2d 561 (1976). We held in denying the motion to dismiss and again hold that the *Rizzo* case is a different species of animal from the case before us. In the *Rizzo* case, two officers of the Philadelphia Police Force an organization of 7500 officers serving a city of 1,750,000 people, which police officers were not named as parties to the complaint, were charged with violating the rights of individuals. The court pointed out there was no proof of any plan or policy by the defendants, express or otherwise, which showed their authorization or approval of the policemen's misconduct. In the instant case there is ample evidence of such authorization or approval, particularly by the defendant Mayor and Chief of Police. The *Rizzo* court also emphasized several times that the individual police officers were not named as parties. In fact, this was printed in italics at various points in the opinion. Here we have the defendant policeman named as a party defendant and most of the trial was spent in examining instances of his alleged misconduct. We are not asked to assume here the supervision of a police force of a large metropolitan city. The cases of *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) and *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 219, 40 L.Ed.2d 566 (1974) were distinguished on the grounds that the individuals charged with misconduct were there named as defendants in the action and it also appeared that there was an adoption of a deliberate policy by public officials in charge of the police force and a pervasive pattern of intimidation. This is the situation in the case at bar. It was further held that the delicacy of adjustment between federal equitable power and state administration of its own laws required the federal court to withhold its hand on principles of comity and equity which restrain a federal court in dealing with state officials. In contrast, in this case, the Commonwealth of Pennsylvania has brought this suit as parens patriae of its citizens in an effort to protect them from this unconstitutional mistreatment. This will be dealt with in the next subdivision of this opinion. Suffice it to say for this purpose the comity and equity which restrain a federal court in mixing in state affairs do not operate since the Commonwealth itself has asked us to assist them in putting a stop to these things for which they claim they have no adequate remedy at law.

[1] Nor is this the case of *Lewis v. Hyland*, 544 F.2d 93 (3d Cir. 1977), where the Court of Appeals for this Circuit refused to restrain the entire New Jersey State Police Force from harassing certain types of individuals from using the New Jersey highways since it was held that the court under *Rizzo* should not undertake supervision of the entire New Jersey State Police Force, that mere showing of a statistical pattern was no basis for belief. On the contrary, here the evidence shows that the defendant public officials, particularly the Mayor and Chief of Police, have not only condoned Baranyai's misconduct but approved and ratified the same and have intimidated or attempted to intimidate citizens who would testify or complain against him. We are cautioned in *Washington Mobilization Commission v. Cullinane*, 184 U.S.App.D.C. 215, 566 F.2d 107 at 122 (D.C.Cir.1977) against reading *Rizzo* too broadly. We hold here that there is no application of *Rizzo v. Good* to this situation involving an individual policeman in a small borough police force in a small municipality in Allegheny County with a population of 5,000 which would prevent this court from vindicating the rights of citizens against conduct such as has been shown in this case.

(2) The Parens Patriae Question.

The defendants soon after this action was brought filed a motion to dismiss claiming that the Commonwealth of Pennsylvania had no standing to bring this suit. The court held that the objection as originally filed was well taken but the defect was amendable if individual plaintiffs who had been wronged by the defendants also joined. See memorandum opinion of this court filed February 24, 1978. We will not repeat at length what was said there but

merely point out that it was held that there was no showing that the Commonwealth of Pennsylvania had been injured personally by the series of events alleged in the complaint under 42 U.S.C. § 1983 but rather claimed the right to bring the suit as parens patriae on behalf of its citizens. At that time, the court queried whether the Commonwealth of Pennsylvania with all of its courts and authority was not able to obtain sufficient relief in its own tribunals without bringing such a controversy to the federal court. It has since then been determined, however, that the Commonwealth has no ready remedy inasmuch as the provisions of the Borough Code [3] provide for removal of a police officer by Council on complaint from the Mayor but the termination is then reviewable by the Civil Service Commission. In the present case, in view of the fact that the Mayor we find has been instigating and ratifying and confirming what Baranyai has done, the remedy appears to be almost useless, particularly in view of the fact that the Mayor has made only perfunctory investigations when complaints have been brought to his attention. We did hold that the rights of the Commonwealth as parens patriae had been expanded in recent years beginning with the Supreme Court case of *Hawaii v. Standard Oil Company*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). The very words "parens patriae" refer to the powers of the English sovereign as father of his country which rights have now vested in the Commonwealth of Pennsylvania since the revolution. It has been held, of course, by the Court of Appeals for this Circuit that the Commonwealth does not have a right to bring an action to redress all injuries received by any of its citizens. See *Commonwealth of Pennsylvania v. Nat'l Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), where it was pointed out that the Commonwealth could bring a suit where its own property had been affected or where the general public had suffered an injury so that no one individual had legal standing to sue. *National Association of Flood Insurers* was a property damage case. The instant case is a question of violation of the constitutional rights of the citizens of Pennsylvania and we held that the Commonwealth did have an interest in the violation of such rights which are guaranteed under both federal and state constitutions and which affect the welfare of Pennsylvania citizens. It was previously held by this court that where individual citizens have filed a suit alleging violation of their rights, the Commonwealth had a right to join as an intervening plaintiff. *See Jordan v. Erie School District*, CA 73-84 Erie, reversed and remanded on other grounds, 548 F.2d 117, where unconstitutional actions of the Erie School District were alleged and the Commonwealth was permitted to intervene to represent the rights of these citizens as well as others. The right of the state to bring such a suit was recognized in *Commonwealth v. Glickman*, 370 F.Supp. 724 (W.D. Pa.1974, Teitelbaum, J.)

[2] The order of February 24, 1978 indicated that suit should be dismissed unless individual citizens who have been deprived of their rights as set forth in the complaint joined as party plaintiffs in this action within 20 days. Such persons did join, viz: the individual plaintiffs Richard W. Baumann, Joseph Blume, James Mages and Bernard W. Peitz, Jr., individually and on behalf of all others similarly situated. While the court did not certify a class action, it was held that the case was one in effect in view of the fact that the Commonwealth was representing the rights of all of its citizens and we are treating this case in such light. We, therefore, hold that the action is properly brought by the Commonwealth joining to protect the constitutional rights of its citizens and to support those individuals who have specifically joined alleging individual grievances.

While the complaint of Baumann has not been sustained, certain complaints of the other individual plaintiffs have been. The court holds that this is sufficient for this purpose and to establish a case or controversy under Article III of the Constitution since we find these persons have reasonable

3. 53 Purdons P.S. § 46121 et seq. See § 7 of discussion, infra.

grounds to apprehend further mistreatment in the future.

(3) Statute of Limitations.

This suit was filed October 5, 1977. The defendant Baranyai has throughout the trial objected to evidence of any events back of the one or two year period preceding the bringing of suit claiming that such evidence should not be permitted under the statute of limitations. It should be sufficient answer that such evidence is admissible under Rule 404(b) to show motives, intent, preparation, purpose, knowledge or absence of mistake or accident and to show plan or design. It is also admissible under Rule 406 to show a pattern or routine practice of a defendant or organization.

The Court of Appeals for this Circuit in *Polite v. Deihl*, 507 F.2d 119 (3d Cir. 1974) has held that since there is no federal statute of limitations under the Civil Rights Act, the state statute of limitations applies and in this area you have to separate an incident into its various components, thus the Pennsylvania statute of limitations for false arrest and malicious prosecution is one year. 12 P.S. § 51 (now repealed). This includes incidental assaults and batteries in connection with the false arrest but does not include beatings occurring after the arrest. As to these, the two year statute of limitations for personal injuries or for assaults and batteries themselves and false imprisonment is applicable. 12 P.S. § 34, 12 P.S. § 31. See also *Ammlung v. City of Chester*, 494 F.2d 811 (3d Cir. 1974).

In the instant case, the only incidents as to which these statutes of limitations might apply are No. 11 Margaret Blume, false arrest November 6, 1974, No. 12 James Mages, assault and battery November 16, 1974, and Richard Stefanick, assault and battery, July 10, 1975. All the other incidents from No. 13 forward are within the appropriate period of limitations.

[3] It should be emphasized again that this is not a suit for damages resulting from assaults and batteries and false arrests. If we were faced with the task of awarding damages for these instances, we would, of course, hold that Nos. 11, 12 and 13 were time-barred by the Pennsylvania statute of limitations, but otherwise we hold that they are admissible for the purposes above set forth. It has been so held in similar cases. *Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Hazelwood School District v. U. S.*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). As noted in Footnote # 15 of Hazelwood, this would be particularly true where the relevant aspects of the decision making process have undergone little change and such is the case here where the attitude and actions of the defendants have been the same down through the years 1974 to date. Such evidence is particularly appropriate in a case like this where we have a difficult problem in fashioning appropriate relief and we must therefore consider even time-barred incidents not too remote for the purpose of establishing a pattern of conduct which has not to this moment in time been abated.

(4) Warrantless Entry Into Private Dwelling for Making of Arrests and Search.

The so-called Nist incident is recounted in Finding of Fact No. 29 in general but merits a somewhat fuller discussion. In this case, defendant Baranyai with some other Millvale Officers were called to support the police in Reserve Township, an adjoining municipality. This was under a backup or assist arrangement between various municipalities in that area. As noted, the Reserve Township Police had received information over the radio about a telephone call from an unknown informant saying that a party and disturbance were going on at the residence of Katy M. and John J. Nist (Katy was the mother) in Reserve Township. The information from an unknown informant was obviously insufficient to justify the issuance of a warrant and when the police arrived, no noise or disturbance was audible on the sidewalk or in the neighborhood and so there were insufficient grounds to justify entry since no disturbance was apparent and there were no neighbors in the immedi-

ate vicinity who were complaining. John J. Nist met the officers in front of the house and when questioned, he said that there was a party or get together going on. Baranyai and the Reserve Township Officer said we are going in to inspect. Nist replied that they had to have a warrant and demanded a warrant. Baranyai told Nist that he did not need a warrant. It appears that Baranyai was the first in the house and he proceeded to ransack the purse and other belongings of Mrs. Katy Nist who was upstairs watching television and also he conducted a search of the rest of the house. According to his story, he was looking for one of the persons at the party who had run upstairs. In this he was justified if his entry was legal, but he was not justified in making detailed searches of the purse and the belongings of Mrs. Nist in looking for the escapee. (The escapee was found lurking under a bed on the second floor.)

[4] The court holds that under these circumstances, there was no justification for entering the house. The court is aware that *Payton v. New York*, is presently before the U.S. Supreme Court, No. 78-5420, on reargument but the case is not dispositive. See summary of the argument in *Payton* before the U.S. Supreme Court at 48 U.S. Law Week 3267. In that case the New York Court of Appeals had split four to three holding that an entry to arrest a felon did not require a warrant. The Court of Appeals for the 8th Circuit, however, more recently in *U. S. v. Houle*, 603 F.2d 1297 (8th Cir. Aug. 17, 1979) has held flatly, following *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, that a warrantless entry into a private home whether to make an arrest or to make a search, both of which occurred in this case, is per se unreasonable in the absence of a number of well defined "exigent circumstances". In the instant case, the officers made no attempt to secure a warrant and under the information at their disposal could not have secured a valid warrant. There were no exigent circumstances such as hot pursuit or a public disturbance which would have justified entry without a warrant, whether to arrest or to search, both of which occurred here. We, therefore, hold that the entry into the Nist house was unlawful, the search was unlawful and that they should be considered as another one of the incidents involving Baranyai since he acted as a leader albeit he had been called by the Reserve Township Police.

[5] Underage drinking is a summary offense governed by Pa.R.Cr.P. 51 formerly 102. A warrantless arrest is only justified where there is breach of the peace which endangers the property or safety of any person present. *Commonwealth v. Shillingford*, 231 Pa.Super. 407, 332 A.2d 824 (1975). This apparently has not filtered through to the Millvale Police Department, particularly Baranyai who tends to regard this offense as a heinous felony under the evidence in this case.

(5) Baranyai Is Subject to Equitable Relief Against Further Violation of Citizens' Civil and Constitutional Rights.

[6-8] As has been shown in the findings, the defendant Baranyai has on numerous occasions been guilty of the use of excessive force or unreasonable force in making an arrest. In many instances where we have found the arrest justified, he has been guilty of extreme assaults upon prisoners after they are lawfully in custody at a police station so the application of force is no longer necessary. This court holds that this gives rise to a cause of action under 42 U.S.C. § 1983 and subjects him to equitable relief. See *Curtis v. Everett*, 489 F.2d 516 (3d Cir. 1973); *Polite v. Deihl*, 507 F.2d 119 (3d Cir. 1974); *Howell v. Cataldi*, 464 F.2d 272. As the court held in *Howell v. Cataldi*, supra, where the application of force by a police officer exceeds that which is reasonable and necessary under the circumstances and also violates standards of decency more or less universally accepted, it amounts to cruel and unusual punishment. Where light blows are administered, they might be considered a mere tort under state law and not subject to suit under 42 U.S.C. § 1983. But here, this conduct and the manner of administering it grades into cruel and un-

usual punishment under *Ingraham v. Wright*, supra.

It has further been held that making of an arrest without probable cause is a constitutional violation under § 1983. See *Patzig v. O'Neil*, 577 F.2d 841 (3d Cir. 1978). We hold that plaintiffs are entitled to equitable relief against Baranyai's conduct in this respect which is likely to be repeated in the future.

The likelihood of repetition in the future is borne out by the fact that in two of these incidents, the witnesses testified they were afraid to come into Millvale for fear of arrest and Baranyai, himself, under cross examination admitted that he was accustomed to telling people to get out of Millvale and stay out or they would be arrested. When questioned by the court as to his right to inflict these people on other municipalities, his reply was that he had authority to do this and they should go back where they belong.

[9, 10] A sentence of outlawry is certainly not authorized for even a trial court of general jurisdiction. See summary of the law in this respect recently in *Rutherford v. Blankenship*, 468 F.Supp. 1357 (W.D. Va.1979) where there is a review of the background of orders of outlawry and banishment. Banishment was a part of the penalties inflicted under English law before and immediately after the Revolution but has never been permitted in this country. As the court well says "To permit one state to dump its convict criminals into another is not in the interest of safety and welfare; therefore the punishment by banishment to another state is prohibited by public policy." See also *Dear Wing Jung v. U.S.* 312 F.2d 73 (9th Cir. 1962); *People v. Baum*, 251 Mich. 187, 231 N.W. 95 (1930). In this particular case, there is no authority in law for an individual policeman to take it upon himself to determine which person should be subject to a de facto sentence of banishment. We hold in this respect there is a violation of the constitutional rights of U.S. citizens to move freely within the confines of this country.

(5) The Anti-Loitering Ordinance of the Borough of Millvale.

The Borough of Millvale has an ordinance governing disorderly conduct and loitering, Ordinance No. 305 adopted January 3, 1911. Insofar as we are concerned in this case only sections Q and R are involved. The definition of disorderly conduct contained in this ordinance (see joint Ex. B) provides:

"Q. All persons persisting in loitering upon the public highway or streetcorners and in front of any stores, shops, places of business, place of amusement or place of worship after being requested to vacate such place or places and move on.

"R. All habitual street or corner loafers."

The court appreciates that the Borough of Millvale like a number of other municipalities in Pennsylvania has a problem with gangs or groups of persons congregating in front of various stores or on street corners so as to block the passageways and to some extent terrorize older citizens. These situations, however can be dealt with under other laws without applying the vague provisions of ordinance No. 305.

The defendant Baranyai particularly uses this ordinance to justify his conduct in falsely arresting a number of the complainants in this case, to wit: Margaret Blume, Kimberly Urbanek, Gilbert Gruemken and Jack Dorn who were simply standing on a sidewalk doing nothing, blocking no one and creating no hazard. As the court remarked at one point early in the trial, it appears to be a criminal offense in Millvale subjecting one to arrest merely to stand upon a sidewalk. As stated, we recognize that municipalities have a legitimate concern in avoiding obstructions of sidewalks and public passages but it is believed that the state law (18 Pa.C.S.A. § 5507) furnishes sufficient basis for handling this problem by the police without resorting to false arrest and other violations of the federal constitution.[4]

4. 18 CPSA § 5507. Obstructing highways and other public passages

(a) Obstructing.—A person, who, having no legal privilege to do so, intentionally or reck-

It will be noted that the state law covers offenses by a person who having no legal privilege to do so intentionally obstructs a highway, sidewalk or other public passage. The final sentence of subsection (a) gives protection to the right of free speech which does not appear to be concerned in any of the incidents before us. The word obstruct is so defined in subsection (c) as to mean rendering impassable without unreasonable inconvenience or hazard and subsection (b) prevents abuse of the words "refusal to move on" in that there must be a reasonable official request or order to move to prevent obstruction of a highway or other public passage or to maintain public safety. In the instances before us as above recited in this case, no one of these elements were present. It appears that these citizens were simply present on a sidewalk doing nothing, blocking no one and creating no hazard and yet the ordinance was distorted by Baranyai to cover their arrests and removal to the police station without statement of any reason being given for the same. The court finds that this is going too far under the decisions of the U.S. Supreme Court. See *Brown v. Texas*, — U.S. —, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (requiring a citizen upon request by the police to identify himself was unconstitutional applies where the officers lacked any reasonable suspicion to believe that the person was engaged or had engaged in criminal conduct). It was stated that seizure of a person under such circumstances must be based on specific objective facts indicating that society's legitimate interests require the seizure of the particular individual and it was held that in such a case the right to personal security and privacy tilts in favor of freedom from police interference. We find the same situation to exist here.

In *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), the court was confronted with an ordinance similar to that of Millvale's but which had been construed by the Alabama courts to cover only cases of obstructing passage and where there was obstruction the defendant refused to move on after request by an officer. In none of the cases before us did this fact exist, but the officer took the ordinance literally to support the arrest of a person who was merely standing on the sidewalk obstructing no one. See also *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

With respect to good faith on the part of the officer in making these arrests, the court finds it is difficult to believe since it was shown the other officers of the police department did not enforce this ordinance in this manner. Rather, it was used by Baranyai to arrest people he did not like or to arrest people for no reason at all either to show his authority or in some way to deter others. However this may be and assuming that Baranyai was acting in good faith in enforcing this ordinance at the behest of his superiors the Chief and the Mayor, who instructed him and other policemen to use the ordinance to break up street corner gangs, this would not amount to a defense against equitable relief sought by the plaintiffs where the evidence shows that he had continued and the inference is he intends to continue such a course of

lessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such gathering.

(b) Refusal to move on.—

(1) A person in a gathering commits a summary offense if he refuses to obey a reasonable official request or order to move: (i) to prevent obstruction of a highway or other public passage; or (ii) to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

(2) An order to move addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the site or location of the gathering.

(c) Definition.—As used in this section the word "obstructs" means renders impassable without unreasonable inconvenience or hazard.

conduct. No one is seeking damages from him for making these arrests in the past. What the court is asked to do is restrain such arrests which have no basis in law in the future. See *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566, where the court said: "Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers. But '[w]e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied.' . . . Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate." *Michigan v. De Fillippo*, — U.S. —, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) does not apply here. That case involved suppression of evidence obtained in the course of an arrest under an ordinance later held invalid.

Again, in *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977), the court held that the qualified immunity for public officials enunciated in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) applies only to damages not to equitable relief.

Under these circumstances, it is not necessary to make a formal holding of vagueness or overbreadth with respect to this ordinance. All we hold is that as construed and applied by Officer Baranyai, it has resulted in false and baseless arrests of various citizens.

[11] It should be noted that he believes that any citizen is subject to the whim of an individual officer and may be required to move or be placed in a police car. This is intolerable. Only if limited to clearing substantial obstructions is it reasonable. *Washington Mobilization Committee v. Cullinane*, 184 U.S.App.D.C. 215, 566 F.2d 107 (D.C. Cir. 1977).

(7) Parties Subject to Injunctive Relief.

The court has previously held that Officer Baranyai himself is subject to equitable relief the exact nature of which will be determined hereafter in this opinion and the order accompanying the same. The court also holds that the other defendants, viz: Chief of Police Porter, Mayor McCarthy and the Borough Council of Millvale are also subject to injunctive relief in this court so as to protect the rights of United States citizens in the future.

Before proceeding further, we should consider the legal setting in which the police department of a Pennsylvania Borough such as Millvale functions. The basic section of the Pennsylvania Borough Code dealing with this matter is 53 P.S. § 46121 as amended by Act February 1, 1966, P.L. (1965) 1656, No. 581, § 1121.[5]

5. "§ 46121. Appointment, suspension reduction, discharge, powers; mayor to have control. Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint and remove, or suspend or reduce in rank, one or more suitable persons, citizens of the United States of America, as borough policemen, who shall be ex officio constables of the borough, and shall and may, within the borough or upon property owned or controlled by the borough or by a municipal authority of the borough whether such property is within or outside the limits of the borough, without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or for violating any ordinance of the borough for the violation of which a fine or penalty is imposed, and notwithstanding any statute pertaining to the same or similar offenses. Any person so arrested shall be received for confinement by the keepers of the jails, lockups, or station houses within the county.

The borough council may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

* * * * * *

The borough may, by ordinance, establish a police department consisting of chief, captain, lieutenant, sergeants, or any other classification desired by the council, and council may, subject to the civil service provisions of this act, if they be in effect at the time, designate the individuals assigned to each office, but the mayor shall continue to direct the manner in

Under this, it will be noted that the borough council has the right to appoint and remove or suspend or reduce in rank borough policemen and may designate one of the policemen as chief of police (in this case defendant Porter). It is further provided in the second paragraph that the mayor shall have full charge and control of the chief of police and police force and has the right to direct the time, place and manner in which they shall perform their duties.

In 53 P.S. § 46124 [6] it is provided that the mayor also may suspend policemen without cause until the next succeeding regular meetings of the council at which time the council may take action as to suspensions, discharges, etc.

Provision is also made in 53 P.S. § 46190 for specific grounds for removal or reduction in rank of a policeman and in § 46191 provision is made for his right to demand a hearing before the civil service commission. It appears that in the case of the Borough of Millvale there is a civil service commission operating and if suspended by Borough Council, Baranyai would have a right to a hearing before the commission and then to take a further appeal to the Court of Common Pleas and thence up through the courts. It would seem obvious that in connection with its powers to suspend or remove a policeman the borough council would have the right to conduct such investigations or hearings as they deem proper and also it is noted under 53 P.S. § 46029(3) the mayor has a duty to report on the state of the borough to the council which would seem to indicate all matters pertaining to borough welfare such as misconduct by the police force. The Commonwealth is correct in claiming that procedures under Pennsylvania law are so cumbersome and ineffectual in a civil rights case as to leave citizens without adequate remedy at law.

[12] In the instant case, we hold that the Chief of Police, the Mayor and the Borough Council have all been so deeply involved in the misconduct of Officer Baranyai as heretofore determined that they are subject to injunctive relief in an attempt to remedy the situation.

(A) Chief of Police Porter.

The evidence indicates that despite complaints Porter never found fault with Baranyai pertaining to the charges. He took no action to discipline him after he was convicted in criminal court of malfeasance in office, he has publicly supported Baranyai in all instances, he could not give a single instance of a report of an investigation to the complainant, and he retaliated against other officers, viz: Cepek, Fishinger, Pfeiffer and Snyder who testified or otherwise complained relative to Baranyai's conduct. The Chief was also the recipient of a complaint from the district attorney of approaches by policemen and the chief himself to witnesses subpoenaed to testify at the Baranyai hearing in his criminal trial in common pleas court in an endeavor to influence the testimony of such witnesses in Baranyai's favor.

which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the chief of police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties. The mayor may appoint special policemen during an emergency in which the safety and welfare of the borough and the public is endangered and auxiliary policemen may be appointed as provided by general law."

6. "§ 46124. Suspension by mayor.

In addition to the powers of council to suspend policemen, the mayor may, for cause and without pay, suspend any policemen until the succeeding regular meeting of the council, at which time or thereafter the council may, subject to the civil service provisions of this act, if they be in effect at the time, suspend, discharge, reduce in rank or reinstate with pay, such policemen: Provided, however, That a policeman suspended by the mayor may not be reinstated by council at a date earlier than ten working days from the date fixed by the mayor for the suspension to commence. In any case where the council has reinstated a policeman, after having been suspended by the mayor, the mayor shall not thereafter suspend such policeman for reasons arising from the same act for which the first suspension was made, or for reasons that the council, in reinstating such policeman, shall have determined not to be grounds for suspension."

(B) Mayor Regis McCarthy.

The evidence in the case is that Mayor McCarthy instigated the police department in using broad powers under Ordinance No. 305 of 1911 to move people off the street who were doing nothing and not obstructing passage and to arrest them upon failure to move at the officer's whim. As is well stated by the defendant the law is that to hold persons subject to relief in this court there must be a showing of actual knowledge, participation, ratification and aiding and abetting. The mere passive sitting by and doing nothing is no grounds for granting relief. See *Walker v. University of Pittsburgh*, 437 F.Supp. 1000 (W.D.Pa. 1978); *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D.Pa.1977). Mayor McCarthy was in receipt of numerous complaints relative to Baranyai's conduct both in and outside council meetings but he found that all complaints were unjustified. Mayor McCarthy told council he would investigate and report back but in most cases no report was made. Any investigation made was, as previously found by this court, perfunctory in nature only and consisted of asking Chief Porter or Officer Baranyai whether there was any basis for the complaint.

Mayor McCarthy has publicly stated that: "As long as I am Mayor, I will not suspend Frank Baranyai from the Millvale Police Force." He also participated in the retaliation against other officers who testified or complained relative to Baranyai. We therefore find that he is causally linked to this pervasive pattern of violation of constitutional rights and is subject to relief under *Rizzo v. Good*, supra, that he is causally linked to police abuse and that practices in this case certainly rise to a custom or usage which is actionable under 42 U.S.C. § 1983. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1957). It should be further emphasized again that we are not in this case being asked to hold these defendants liable for damages but only to grant injunctive relief to prevent further deprivation of the rights of citizens while in Millvale.

(C) The Borough Council.

With respect to Borough Council the evidence shows that citizens soon learned that complaints to the Borough Council were useless. The Borough Council itself has, however, taken an active part in the Baranyai affair. It twice adopted resolutions supporting Baranyai's conduct on July 12, 1977, (Plaintiff's Ex. 15) and on February 14, 1978, (Plaintiff's Ex. 12).

Notwithstanding that Baranyai was convicted on criminal charges against him and this case was filed October 5, 1977, detailing the complaints against him, the Borough Council has nevertheless refused to take further action. Two members of the Borough Council who endeavored to induce it to do something about the situation and exercise its powers were voted down by a vote of 5 to 2 and were subject to personal abuse.

It has been held that if local authorities fail in their duties then judicial authority may be invoked. See *Swann v. Charlotte Mecklenburg School District*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) dealing with prison conditions subject to an administrative injunction to prevent further violation of constitutional rights of inmates when the court has exercised patience in the past in approaching the problem.

Beginning in 1975, the Borough Council began to get complaints about the conduct of Officer Baranyai and notwithstanding the verdict of guilty in the criminal cases and the bringing of this suit has failed to make any investigation or take any steps towards removing or suspending him. This is not a case like *Rizzo* depending on statistical proof. The proof here pinpoints violations by one police officer against individual citizens who have appeared on the stand and complained. The police officer is a defendant here as well as the other borough officials who are involved in this unhappy proceeding and whose actions have encouraged Baranyai in further violations. For what reason there has been this unusual extension of favors and encouragement to

court does not believe that in such a situation the requirements of the federal constitution can go on being ignored and with the equitable relief provided for under the Civil Rights Act, 42 U.S.C. § 1983 denied. This is an extreme case but something must be done to protect citizens. We find this course of conduct on the part of Baranyai encouraged and supported by the other defendants in this case will continue unless some restraint is exercised by the court.

It is also noted that testimony indicates that defendants Porter and Baranyai believe that there is a widespread conspiracy against them by the Mafia, by Civil Rights organizations and by the Pennsylvania Department of Justice and that questioning of Baranyai's conduct is improper and illegal. What this indicates with respect to Baranyai's thinking, we cannot at this time determine. Defendant Porter has attempted to retaliate against and harass and intimidate the Pennsylvania Department of Justice for taking up the cudgels in favor of citizens in this case. The deputy attorney general filing this suit was shortly thereafter arrested for harassment and an attempt has been made to get the Pennsylvania Attorney General to disband the community advocate unit. Under these circumstances, we have no hesitation in finding that all the defendants in this case were causally linked to the police abuse by Officer Baranyai, that there was a pervasive pattern of support for him and his misconduct and this amounts to a custom and usage under 42 U.S.C. § 1983 and *Monell*, supra. As was explicated by our Court of Appeals in *Lewis v. Hyland*, 554 F.2d 93 (3d Cir. 1977) with respect to *Rizzo*, *Rizzo* does allow limited federal intervention into state police practices in those instances where it could be found that a pervasive pattern or policy of unconstitutional behavior was causally related to the named official defendants. We so find in this case. See also *Santiago v. Philadelphia*, supra.

We are not at this moment in this case particularly concerned with the question of imposing the federal courts upon the operations of the state of Pennsylvania or its municipalities by granting of equitable relief because, as noted, the Commonwealth of Pennsylvania is one of the plaintiffs here and is specifically asking for such intervention. We are still, of course, mindful of the delicacy of adjustments between federal equitable power and the administration of the affairs of this borough by elected officials. But when the State of Pennsylvania confesses it has no handy remedy to prevent the abuse of citizens as shown in this case from continuing certainly the federal courts have a right to vindicate the federal constitution.

(8) Remedies.

As has been pointed out in *Swann v. Charlotte Mecklenburg Board of Education*, supra, and *Monell*, supra, the court has wide discretion in determining appropriate remedies to be employed in a situation such as exists here.

We are cautioned, of course, by the Court of Appeals for this Circuit in *Lewis v. Hyland*, supra, involving a proposed injunction against the New Jersey State Police where the lower court did find a pattern and practice of constitutional violations by individual policemen but could not find that there was joinder in such acts by supervisory officials, *Rizzo*, supra, is a roadblock of formidable dimensions. The court in *Lewis v. Hyland*, supra, however, did find that where a plan or practice was found which is a causal link to the individual officer's conduct, relief may be granted. We have so found in this case and hold that this case goes far beyond the mere failure to act as in *Rizzo*. Rather, it falls within the pattern of *Allee v. Medrano*, supra, and *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

As we have noted previously, much of *Rizzo* appears to be based upon the delicate balance between federal and state authority in our system of federalized government in this country and a desire not to intrude upon the day-to-day operations of a large metropolitan police force.

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We have some precedent in the decision of Judge Snyder of this court in *Wecht v. Marstellar*, 363 F.Supp. 1183 (W.D.Pa.1973) where a Pittsburgh City motorcycle policeman had engaged in a course of illegal and unconstitutional conduct using wrongful and excessive force and the evidence disclosed a pattern that violated the constitutional rights of users of the sidewalks and streets of the City of Pittsburgh. An injunction was issued prohibiting the defendant from engaging in certain specific types of acts.

In the case at bar we find that for Officer Baranyai to continue to act as a policeman upon the streets of Millvale will only lead to further disruptions and violations of constitutional rights and that some injunction is necessary to protect the citizens from continuing future happenings of this kind.

We are admonished as heretofore noted by the decision of the U.S. Supreme Court in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 28 L.Ed.2d 554 (1978) to exercise patience in cases of this kind and not to intrude the federal court into day-to-day management of a penal institution except as a last resort. As expressed by Judge Snyder in *Wecht v. Marstellar*, supra, the deprivations of the constitutional rights of citizens must be stopped but there should be no unnecessary encroachment on state and local government functions. Equitable relief in such circumstances must be specifically tailored to fit the events of a particular case. *Schweiker v. Gordon*, 442 F.Supp. 1134 (E.D.Pa.1977).

In assessing the interference of this court in state and municipal governments, we must remember that 42 U.S.C. § 1983 was enacted under the Fifth Section of the Fourteenth Amendment as appropriate legislation to carry out its purpose and we cannot permit the salutory purpose of § 1983 and the Fourteenth Amendment to be sidetracked by fear of undue interference with state and municipal governments, particularly where, as here, the Commonwealth of Pennsylvania is asking this court to protect its citizens from the depredations of this one individual and those acting in concert with him. We hold that the injunctive relief herein provided will not interfere unduly with the daily internal workings of the Millvale Police Department in accordance with the teachings of *Rizzo*. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1975).

(D) Conclusions of Law.

(1) This court has jurisdiction over this action and these defendants.

(2) Local law enforcement officials who act under color of state law and who use excessive force or who make illegal arrests or who otherwise deny citizens their constitutional rights are subject to the equity powers of this court under 42 U.S.C. § 1983. Defendants, under color of state law, have engaged in a course of illegal and unconstitutional conduct by using wrongful and excessive physical force on numerous occasions, making illegal arrests, conducting illegal searches, by intimidating and harassing citizens, and by retaliating against those who would complain of such illegal and unconstitutional conduct.

(3) The actions of defendants were directed against various citizens, some of whom were in the custody and control of defendant Baranyai and some of whom were otherwise lawfully upon the streets and sidewalks of the Borough of Millvale.

(4) The deprivation of constitutional rights of the plaintiffs and the persons they represent constitutes irreparable harm for which they are entitled to equitable relief.

(5) Plaintiffs do not have an adequate remedy at law.

(6) Injunctive relief is essential to prevent defendants from continuing to deprive plaintiffs and the individuals they represent of their constitutional rights.

(7) The evidence in this case shows a pervasive pattern of participation, affirmance, encouragement and aiding and abetting of the unlawful conduct of Baranyai by the other defendants.

(8) It is clear that the unlawful conduct of defendants in violating the constitutional rights of plaintiffs and the individuals they represent may recur unless enjoined.

(9) On the basis of the evidence as presented in this case which shows a continued course of conduct on the part of defendants, which course of conduct violates the constitutional rights of the plaintiffs and those individuals they represent, it is the conclusion of this court that a permanent injunction should issue against defendants enjoining them as set forth in the order accompanying this opinion.

We reserve for future determination the rights, if any, of plaintiff's attorneys to counsel fees and expenses. The attorneys for the plaintiff, if they intend to seek such counsel fees and expenses, are directed to file appropriate petitions for the same with details of time spent as required by the cases in the Court of Appeals of this Circuit within 20 days from the date of this opinion.

UNITED STATES of America, Plaintiff,

v.

NEW ORLEANS PUBLIC SERVICE, INC., Defendant.

Civ. A. No. 73-1297.

United States District Court, E. D. Louisiana.

Nov. 16, 1979.

The United States brought suit to compel nonexempt government contractor to comply with an executive order prohibiting employment discrimination and with rules and regulations promulgated thereunder. The District Court entered a decision adverse to the government contractor, and the contractor appealed. The Court of Appeals, 553 F.2d 459, modified and affirmed. The contractor petitioned for a writ of certiorari, and the United States Supreme Court, 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of a Supreme Court decision. Thereafter, the Fifth Circuit, 577 F.2d 1030, vacated the district court's judgment, and remanded. On remand, the District Court, Cassibry, J., held that: (1) the district court had subject-matter jurisdiction; (2) since the United States Supreme Court and the Fifth Circuit had specifically remanded for reconsideration in light of a particular recent Supreme Court decision, the District Court was required to reconsider the merits only with respect to that decision; (3) a proceeding in a district court for injunction or administrative hearing for injunction after conciliation has failed are appropriate remedies under the rules and regulations; and (4) the executive order requiring that specified equal opportunity language be placed in each nonexempt government contract and rules and regulations of the Secretary of Labor promulgated thereunder, including regulation requiring employers to permit access to their premises for on-site compliance inspections, did not violate the Fourth Amendment.

Ordered in accordance with opinion.

1. Federal Courts ⇐232

Federal district court had subject-matter jurisdiction of suit wherein Attorney General, on behalf of United States, sought to require nonexempt government contractor to comply with executive order relating to equal opportunity and with rules and regulations of the Secretary of Labor promulgated under the order. 28 U.S.C.A. § 1345; Executive Order No. 11246, § 201 et seq., 42 U.S.C.A. § 2000e note.

2. Courts ⇐37(2)

A motion to dismiss for lack of subject-matter jurisdiction may be raised at any time by any interested party.

3. Federal Courts ⇐951

Where the United States Supreme Court and the Fifth Circuit had specifically remanded case for reconsideration in light of a particular decision, it was only with

Supplemental Appendix

Office-Supreme Court, U.S.
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CLERK

81-465

In the Supreme Court of the United States

TERM

No.

JAMES D. PORTER, FRANK L. BARANYAI and REGIS J. McCARTHY,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents

Supplemental Appendix

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COMMONWEALTH OF PENNSYLVANIA, Richard W. Baumann, Joseph Blume, James Mages and Bernard Peitz, Jr.

v.

James D. PORTER, Chief of Police, Frank L. Baranyai, Police Officer, Regis J. McCarthy, Mayor, Carl Seidl, President of Council, Maurice P. Bedel, Sr., James Beran, John L. Cavanaugh, Jerry Dawson, James H. Lawson and Stephen Mikus, Members of Council, all of the Borough of Millvale.

Civ. A. No. 77-1164.

United States District Court,
W. D. Pennsylvania.

Nov. 16, 1979.

Commonwealth of Pennsylvania and individual citizens brought civil rights action against policeman and borough officials alleging repeated civil rights violations. The District Court, Knox, J., held that policeman who committed repeated violations of citizens' civil rights and mayor, chief of police and borough council who instigated, acquiesced in, or ratified such violations would be permanently enjoined from participating in or encouraging future deprivations of civil rights.

Order accordingly.

1. Civil Rights 13.4(2)

Holding of *Rizzo v. Good* restraining a federal court from mixing in state affairs had no application to civil rights action involving individual policeman in small borough police force in small municipality, so as to preclude district court from vindicating rights of citizens. 42 U.S.C.A. § 1983.

2. Civil Rights 13.6

Commonwealth of Pennsylvania had standing to bring civil rights suit against policeman and borough officials alleging repeated civil rights violations in order to protect constitutional rights of Commonwealth's citizens. 42 U.S.C.A. § 1983.

3. Civil Rights 13.13(2)

In civil rights suit against policeman and borough officials alleging repeated civil rights violations, evidence of civil rights violations which occurred more than two years prior to initiation of action was admissible in order to know motives, intent, preparation, purpose, knowledge or absence of mistake or accident, plan or design and also to show pattern or routine practice of defendants, in spite of applicability of Pennsylvania two-year statute of limitations. 42 U.S.C.A. § 1983; Fed.Rules Evid. Rules 404(b), 406, 28 U.S.C.A.; 12 P.S.Pa. § 51 (Repealed).

4. Searches and Seizures 3.3(1)

Where police received information over radio about telephone call from unknown informant saying that a party and disturbance were going on at certain residence and no noise or disturbance was audible at residence and no neighbors in the immediate vicinity were complaining, there was no justification for entering and searching house.

5. Arrest 63.1

A warrantless arrest is justified only where there is a breach of peace which endangers property and safety of any person present.

6. Civil Rights 13.4(2), 13.16

Repeated violations of civil rights by borough policeman gave rise to cause of action under civil rights statute and subjected policeman to equitable relief. 42 U.S.C.A. § 1983.

7. Criminal Law 1213

Where application of force by police officer exceeds that which is reasonable and necessary under circumstances and also violates standards of decency more or less universally accepted, it amounts to "cruel and unusual punishment." U.S.C.A.Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights 13.4(2)
Criminal Law 1213

Where light blows are administered by a police officer, they may be considered a mere tort under state law and not subject to suit under civil rights statute; however, conduct and manner of administering blows may constitute "cruel and unusual punishment." 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8.

9. Criminal Law 1208(4)

A sentence of outlawry is not authorized for even a trial court of general jurisdiction.

10. Constitutional Law 83(1)

Policeman's conduct in ordering citizens not to return to community constituted violation of constitutional rights of citizens to more freely within confines of country.

11. Municipal Corporations 594(1)

Borough antiloitering ordinance, as interpreted by individual police officer resulting in false and baseless arrests of various citizens, was unconstitutional.

12. Civil Rights 13.16

Police officer, chief of police, mayor and borough council were permanently enjoined from participating in or acquiesc-

ing in future violations of civil rights by police officer. 42 U.S.C.A. § 1983.

Michael Louik, Paul D. Boas, Pittsburgh, for petitioners.

Daniel J. Weis, Alfred C. Maiello, Bruce E. Dice, Pittsburgh, for defendants.

OPINION

KNOX, District Judge.

A. Introduction.

In this case involving claims of repeated violations of civil rights contrary to 42 U.S.C. § 1983 by Frank L. Baranyai (Baranyai) a policeman of the Borough of Millvale, Allegheny County, Pennsylvania, the court sitting non-jury has heard testimony over a period of 14 days. It is also claimed that Regis J. McCarthy (McCarthy), Mayor of Millvale and James D. Porter (Porter), Chief of Police have instigated, acquiesced in, or ratified these violations and hence are named as defendants. The president and members of the Borough Council are also defendants, it being asserted that they were aware of Baranyai's conduct, took no action and supported him.

At the conclusion of the trial on May 10, 1979, the court dictated a memorandum as to the proceedings on the record with tentative findings in favor of the plaintiff on 22 incidents and in favor of the defendants on 11 incidents.

The parties were directed to file briefs with respect to these matters as well as other questions of law involved including the relief, if any, to be granted. Arguments on the merits were scheduled for June 27, 1979, but had to be postponed twice because of scheduling problems. They were finally held August 21, 1979, with additional materials being submitted at later dates. The court is now prepared to adjudicate the matter and enters the following:

B. Findings of fact.

(1) This is an action brought by the Commonwealth of Pennsylvania and individual plaintiffs to enjoin defendants from engaging in a pattern of practice which denies citizens lawfully in the Borough of Millvale their constitutional rights to be free from physical violence, mistreatment, threats, harassment, illegal detention, illegal arrest, illegal searches and seizures, and other unconstitutional conduct.

(2) Plaintiffs allege that defendants have engaged and are engaging in a continuing course of unconstitutional police misconduct and abuse.

(3) Plaintiff Commonwealth of Pennsylvania brings this action on its own behalf and on behalf of its citizens, including the residents of the Borough of Millvale and all others who may lawfully be in Millvale.

(4) Individual plaintiffs are citizens of the United States and the Commonwealth of Pennsylvania and bring this action on their own behalf and on behalf of all persons residing in or otherwise lawfully in the Borough of Millvale and all persons who will in the future reside in or lawfully be in the Borough of Millvale. The court, however, refused to certify a class action, relying on the Commonwealth to represent the class.

(5) Defendant Frank L. Baranyai is and was a police officer employed by the Borough of Millvale at all times here involved.

(6) Defendant James D. Porter is employed by the Borough of Millvale as Chief of Police and has served in said capacity at all times relevant to this action.

(7) Defendant Regis J. McCarthy serves as Mayor of the Borough of Millvale and has served in said capacity at all times relevant to this action.

(8) All other defendants are present or past members of the Millvale Borough Council.

(9) The Borough of Millvale is a municipality incorporated as a Borough pursuant to the laws of the Commonwealth of Pennsylvania.

(10) The Borough of Millvale has established and maintains a police department pursuant to the Borough Code, 53 P.S. § 45101, et seq.

(11) On November 6, 1974, defendant Baranyai unlawfully arrested and detained Margaret G. Blume while she was lawfully standing on a street corner in the Borough of Millvale. While defendant Baranyai claims that Mrs. Blume, a woman in her late forties was dressed as her daughter Judy for the purpose of entrapping him into making false arrest, nevertheless, he concedes that he recognized her as the mother when she turned around. He packed her into the police car and took her to the station. The mother is much heavier set than the daughter.

(12) On November 16, 1974, defendant Baranyai brutalized and unlawfully assaulted and mistreated James Mages by beating him about the shoulders, arms, head and face with his fists and blackjack, by beating Mages' head against the wall, and by threatening to shoot him with a shotgun and revolver, all of which occurred while Mages was handcuffed and confined in the Millvale Police Station. We find that Mages was handcuffed during the time that the incident arose as the result of unlawful arrest of one Walter Brightenbaugh without warrant.

(13) On July 10, 1975, defendant Baranyai beat and unlawfully assaulted and mistreated Richard Stefanick by striking him about the face and head with a flashlight while Stefanick was in his custody and control. The court does not condone Stefanick's prior conduct or hold the arrest was illegal, but this forms no legal basis for the beating after he was secure.

(14) On May 24, 1976, defendant Baranyai brutalized and unlawfully assaulted and mistreated Daniel Burchill by beating Burchill with a nightstick across the ribs while Burchill was handcuffed and in his custody and control. This attack was corroborated by Officer Cepek.

(15) On June 18, 1976, defendant Baranyai beat and unlawfully assaulted and mistreated Richard Stefanick with a blackjack while Stefanick was in his custody and control in the Etna Police Station. At the hospital where he was taken, edema and contusions about the face were found consistent with blows by a blackjack.

(16) On June 22, 1976, defendant Baranyai beat and unlawfully assaulted and mistreated Patrick Hughes by striking him about his arms and stomach with a nightstick while Hughes was in his custody and control in the Etna Police Station. The court finds the blows struck on the street did not constitute excessive force but the attack in the police station, verified by two other officers did.

(17) On January 29, 1977, defendant Baranyai unlawfully harassed and mistreated Franz J. Hersick by stopping his automobile, pulling Hersick out of his car, unlawfully arresting and detaining him in a cell and causing an illegal search to be made of Hersick's car. Hersick was refused the right to use the telephone to call his attorney and his car was unlawfully searched without warrant.

(18) On March 25, 1977, defendant Baranyai beat and unlawfully assaulted and mistreated David Stier and banged Stier's head against the pavement while taking him into custody. He had been subdued but Baranyai persisted in banging his head on the pavement and threatening to split his skull open. This was verified by testimony of a bystander. The force was excessive and might have resulted in a fractured skull.

(19) In November, 1977, defendants subjected Franz J. Hersick to unlawful retaliation, harassment and intimidation

because he had complained of police misconduct and abuse by defendant Baranyai. He was entrapped by defendant Porter into going to the office of defense counsel Dice and there interviewed without his attorney. Attempts were made to get him to change his statement and Porter threatened him with suit for complaints against Baranyai.

(20) On March 15, 1978, and on various other dates, defendant Baranyai subjected Patrick Hughes to unlawful retaliation, harassment and intimidation because he had complained of police misconduct and abuse by defendant Baranyai. Hughes was told to get out of Millvale and stay out. This was corroborated by another officer and Baranyai claimed a right to tell persons selected by him to stay out of Millvale.

(21) On July 12, 1977, defendant Baranyai subjected Joseph Blume to unlawful arrest, retaliation, harassment and intimidation because he had complained of police misconduct and abuse by defendant Baranyai. He was attacked and punched, refused leave to use the telephone and not informed of charges against him. The court finds his repudiation of his complaint to Mayor McCarthy was made under compulsion by Baranyai.

(22) On April 12, 1978, shortly after the incident described in 20 defendant harassed Joseph Blume and wife eating a milkshake. He followed them and told them to stay out of Millvale. Blume is afraid to go into Millvale for fear of arrest.

(23) On November 17, Bernard Pietz was summoned to the police station in Millvale by defendant Porter who yelled and shouted at him in attempt to intimidate him in connection with his giving testimony against Baranyai in a criminal trial about to commence in the Court of Common Pleas. He was threatened with suit if Baranyai was acquitted.

(24) On July 4, 1978, defendant Baranyai unlawfully arrested and detained Kimberly Urbanek, a Clerk of the

County Court Reporters while she was lawfully standing on a sidewalk in the Borough of Millvale. She was taken to the police station and cited. Charges of loitering in violation of state law were dismissed by the Court of Common Pleas.

(25) On an unknown date, defendant Baranyai brutalized and otherwise mistreated Robert Angel by beating him with a blackjack while Angel was in his custody and control. This was verified by Sergeant Pfeiffer. On remonstration by Pfeiffer who was in charge Baranyai replied: "No one interferes with my arrests or tells me what to do."

(26) On March 2, 1979, defendant Baranyai unlawfully arrested and detained Gilbert R. Gruemken, Jack Dorn and Tom Newman while they were lawfully standing on a street corner in the Borough of Millvale. The court finds he stopped his police car, made them get in and took them to the police station without giving any reason.

(27) On March 15, 1979, defendant Baranyai arrested John Ayres, age 11, while he was lawfully upon the streets of the Borough of Millvale and further, he unlawfully detained and mistreated John Ayers while John was in his custody and control in the Millvale Police Station. The boy had kicked another boy without injury while emerging from a school bus. He was placed in a police car, taken to the station and interrogated concerning another incident without *Miranda* warnings and without calling his parents. He was threatened with Juvenile Court. On cross examination, it developed Baranyai did not regard this as an arrest.

(29) On March 30, 1979, defendant Baranyai unlawfully without warrant entered the home of Katy M. Nist and John J. Nist located in Reserve Township, and he did unlawfully conduct a search of the premises, of various personal belongings and of various individuals therein. The householder demanded a warrant and Baranyai responded he didn't need a warrant. There was no probable cause for entry, the same being based

upon a telephone call from an unknown informant broadcast over the radio. No known neighbors complained and no noise was audible on the sidewalk.

(30) On March 30, 1979, defendant Baranyai unlawfully ordered Jack Dorn to remove himself from the front steps of a Millvale resident's home or be arrested. The householder stated he had no objections to Dorn sitting on the steps.

(31) On July 14, 1977 and July 18, 1977, criminal complaints were filed in Allegheny County, Pennsylvania, against defendant Baranyai specifically alleging numerous of the incidents set forth above.

(32) On February 8, 1978, after a jury trial in the Allegheny County Court of Common Pleas, Criminal Division, defendant Baranyai was found guilty of one count of Simple Assault (18 Pa.C.S.A. § 2701), and two counts of Official Oppression (18 Pa.C.S.A. § 5301). The conviction of Simple Assault and one of the counts of Official Oppression arose from the criminal complaint filed by David Stier. The other count of Official Oppression arose from the complaint filed by Deputy Attorney General, Michael Louik, wherein Baranyai was accused of a pattern of misconduct and abuse beginning in the Summer of 1973.

(33) On June 26, 1978, defendant Baranyai was sentenced to pay a fine of $1,000, two years probation and to pay the court costs. This case is now on appeal. The affirmance or not of the convictions is of no importance here because in that case the Commonwealth was required to prove guilt beyond a reasonable doubt while here we are only concerned with preponderance of the evidence.

(34) At no time during the criminal proceedings against defendant Baranyai was he ever suspended, reprimanded or otherwise disciplined by the other defendants. At no time whatsoever has defendant Baranyai ever been suspended,

reprimanded or otherwise disciplined for any of the matters alleged in this action.

(35) On October 5, 1977, the complaint in this action was filed. Two days later on October 7, 1977, defendant Baranyai filed criminal charges against Deputy Attorney General Michael Louik, one of the attorneys herein, charging him with Barratry (18 Pa.C.S.A § 5109) and harrassment (18 Pa.C.S.A. § 2709). Said charges were filed against Deputy Attorney General Louik in his official capacity and alleged, among other things criminal violations arising from the institution of this action. In February, 1978, defendant Baranyai withdrew these criminal charges.

(36) On the second day of the trial of this case in the hallway immediately outside the courtroom in which this case was being tried, the defendant Baranyai pointed out one of the attorneys for the plaintiffs and described him as representing the Mafia. This was in the presence of witnesses for the plaintiff who testified they felt harrassed and intimidated. The defendant claimed he was unaware these were plaintiffs witnesses but admitted he had made similar statements previously. The court finds this is typical of defendant's conduct in attempting to harass witnesses and attorneys who bring proceedings against him. The court finds this is some evidence of consciousness of guilt.

(37) The other defendants have been aware of allegations of police misconduct and abuse by defendant Baranyai since at least April 13, 1974.

(38) Complaints regarding misconduct and abuse by defendant Baranyai were heard at numerous regular monthly meeting of Millvale Borough Council since August 13, 1974.

(39) Neither defendant Porter nor defendant McCarthy ever conducted a meaningful investigation or other inquiry to determine whether or not allegations regarding police miscon-

duct and abuse by defendant Baranyai were true. Any investigations made were purely perfunctory going no further than asking Baranyai if the charges were true.

(40) Defendants Seidl, Bedel, Beran, Cavanaugh, Dawson, Lawson, and Mikus, members of the Borough Council, never conducted any investigation or other inquiry to determine whether or not allegations regarding police misconduct and abuse by defendant Baranyai were true. Beran did protest against the failure to investigate and was subjected to a personal attack by defendant Porter. Lawson also protested. Their protests were voted down.

(41) Although defendants have been aware of allegations of police misconduct and abuse by defendant Baranyai and although defendant Baranyai was convicted of said misconduct and abuse in the Allegheny County Court of Common Pleas, Criminal Division, defendants have taken no action whatsoever to end or otherwise deter the illegal conduct by defendant Baranyai. Defendants did support defendant Baranyai's illegal conduct and took official action in this regard on July 12, 1977, and February 14, 1978.

(42) Defendant Baranyai was convicted of criminal offenses involving police misconduct and abuse, and yet he continues to engage in said unconstitutional conduct with the knowledge, approval and participation of the other defendants and said unconstitutional conduct is likely to continue in the future, unless the situation is remedied by this court.

(43) With respect to the remaining incidents complained of by the plaintiffs, the court finds for the defendant, either because no evidence was submitted in support of the complaint or because the court finds that the plaintiff's case with respect to such complaints was not established by the preponderance of the credible evidence. These items are as follows (Numbering is from list of incidents contained in plaintiff's preliminary proposed findings of fact submitted May 11, 1979 and used by

both parties throughout the trial of this case): 14. Unknown resident of Millvale, 15. Arthur, 16. Bowman, 17. Peitz, 19. Thomson, 22. Zurcher, 25. Goetz, 27. Stefanick, 28. Thomas Brown, 29. Duffy, 30. Stefanick, 36. Robert Myers, (The court finds as to Myers that force was used, but is was only sufficient force necessary to subdue an unruly drunken prisoner), 37. Newman, 41. Eileen Ayres, 42. Unknown resident of Millvale, 45. Marta Dorn.

(44) The court also finds against the plaintiffs and in favor of the defendants with respect to the matter of Kevin Walsh and Mark Miller the subject of the matter heard on petition for additional hearing and additional proposed finding of fact. The court finds that in this instance, the preponderance of the evidence is in favor of the defendants.

C. Discussion.

Gilbert and Sullivan many years ago pointed out: "When constabulary's duty's to be done, the policemen's lot is not a happy one."[1]

The truth of this observation comes home here where we have a case largely centered against one police officer, a member of a small borough police force, who has had some training and has demonstrated zeal and initiative in the performance of his duties. It is inevitable that in the performance of his duties a policeman of this type should meet with resistance and become the subject of vilification. We have made due allowance for this with respect to certain incidents complained of, finding that the weight of the evidence is with the defendant.

We do find, however, that in a large number of incidents as set forth in the findings of fact, supra, the defendant Baranyai has engaged in a pattern of practice denying citizens residing in and otherwise lawfully in the Borough of Millvale,

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[1]Gilbert & Sullivan "The Pirates of Penzance" (1880).

Allegheny County, their rights to be free from physical violence, mistreatment, threats, harassment, illegal dentention, illegal arrest and illegal searches and seizures. If we were confronted with only a single isolated incident charged against defendant Baranyai, we would relegate the individual plaintiff to a suit for damages under the Civil Rights Act. We do, however, find that there is a long continued pattern of misbehavior which justifies the intervention of the equitable powers of this court in an endeavor to protect citizens from further mistreatment of the type outlined. In other words, we find Baranyai, in many instances, it too zealous in the performance of his duties and resorts to excessive force. There are several incidents here of illegal arrest of citizens whose only offense was standing on a sidewalk in the Borough of Millvale. Other people have been beaten as demonstrated by testimony of the third parties and corroboration by doctors at hospitals. In many instances, he seems to derive satifaction from such a course of conduct, taking prisoners who are already secure, in custody and handcuffed with their hands behind their back to a place in the basement of the Millvale Police Station where he "works them over" with a blackjack or nightstick. We cannot tolerate misconduct of this kind.

The U.S. Supreme Court has recently said with respect to the rights of citizens in this respect in *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977):

> "The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protections against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprevation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men'. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923); see *Dent*

v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security:

"While the contours of this historic liberty interest in the context of our federal system of government have not been defined pricisely, they always have been thought to encompass freedom from *bodily* restraint and punishment. See *Rochin v. Calif.*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183,25 A.L.R.2d 1396 (1952). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

"This constitutionally protected liberty interest is at stake in this case. There is, of course, a *de minimis* level of imposition with which the constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."

The Supreme Court notes that under our Constitution, we are entitled to at least the protection against governmental power which the colonists had previously enjoyed as Englishmen against the power of the Crown. The language in *Ingraham v. Wright*, is an echo of the words of Magna Carta laid down in the year 1215 in an attempt to curb the arbitrary exercise of power by the king.[2]

Our Civil Rights Act, 42 U.S.C. § 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Terri-

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[2]"No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. (2) We will sell to no man, we will not deny or defer to any man either Justice or Right."

tory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

We have noted the Mayor and Borough Council of the Borough of Millvale have been aware of the conduct of the defendant Baranyai at least from the year 1975 to the present date and have made no adequate investigation of the complaints made to them or made at Council meetings. Any investigation conducted by the Mayor or Chief of Police was a perfunctory investigation only involving merely asking the defendant Baranyai whether he had engaged in the conduct complained of. No attempt was made to interview the citizens and to determine whether there were witnesses to support their complaints.

We further find that the Mayor and Chief of Police, defendant Porter, have to a large extent aided, abetted, confirmed and ratified the conduct of the defendant Baranyai and in many cases have instigated the conduct complained of and have threatened and harassed citizens who were bold enough to make complaints as to this course of action.

The findings of fact alone should be sufficient to justify equitable intervention. The complaint merely asks for a preliminary and permanent injunction prohibiting defendants from subjecting the residents of Millvale and other persons lawfully in Millvale to unconstitutional physical violence, mistreatment, threats or harassment and from unconstitutional detentions, searches, seizures, arrests and imprisonment. We are not asked to award damages to any individual plaintiff but only to take steps by way of injunctive relief to protect the citizens from this course of conduct in the future. We will, however, discuss certain legal questions which present themselves in this case.

(1) The Rizzo case.

The defendants originally moved to dismiss this case alleging that the court had no power to interfere with the operations of the police force in the Borough of Millvale, Allegheny County under the decision of the U.S. Supreme Court in *Rizzo v. Good*,423 U.S. 362, 96 S.Ct. 598, 26 L.Ed.2d 561 (1976). We held in denying the motion to dismiss and again hold that the *Rizzo* case is a different species of animal from the case before us. In the *Rizzo* case, two officers of the Philadelphia Police Force an organization of 7500 officers serving a city of 1,750,000 people, which police officers were not named as parties to the complaint, were charged with violating the rights of individuals. The court point out there was no proof of any plan or policy by the defendants, express or otherwise, which showed their authorization or approval of the policemen's misconduct. In the instant case there is ample evidence of such authorization or approval, particularly by the defendant Mayor and Chief of Police. The *Rizzo* court also emphasized several times that the individual police officers were not named as parties. In fact, this was printed in italics at various points in the opinion. Here we have the defendant policeman named as a party defendant and most of the trial was spent in examining instances of his alleged misconduct. We are not asked to assume here the supervision of a police force of a large metropolitan city. The cases of *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) and *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 219, 40 L.Ed.2d 566 (1974) were distinguished on the grounds that the individuals charged with misconduct were there named as defendants in the action and it also appeared that there was an adoption of a deliberate policy by public officials in charge of the police force and a pervasive pattern of intimidation. This is the situation in the case at bar. It was further held that the delicacy of adjustment between federal equitable power and state administration of its own laws required the federal court to withhold its hand on principles of

comity and equity which restrain a federal court in dealing with state officials. In contrast, in this case, the Commonwealth of Pennsylvania has brought this suit as parens patriae of its citizens in an effort to protect them from this unconstitutional mistreatment. This will be dealt with in the next subdivision of this opinion. Suffice it to say for this purpose the comity and equity which restrain a federal court in mixing in state affairs do not operate since the Commonwealth itself has asked us to assist them in putting a stop to these things for which they claim they have no adequate remedy at law.

[1] Nor is this the case of *Lewis v. Hyland*, 544 F.2d 93 (3d Cir. 1977), where the Court of Appeals for this Circuit refused to restrain the entire New Jersey State Police Force from harassing certain types of individuals from using the New Jersey highways since it was held that the court under *Rizzo* should not undertake supervision of the entire New Jersey State Police Force, that mere showing of a statistical pattern was no basis for belief. On the contrary, here the evidence shows that the defendant public officials, particularly the Mayor and Chief of Police, have not only condoned Baranyai's misconduct but approved and ratified the same and have intimidated or attempted to intimidate citizens who would testify or complain against him. We are cautioned in *Washington Mobilization Commission v. Cullinane*, 184 U.S.App.D.C. 215, 566 F.2d 107 at 122 (D.C.Cir.1977) against reading *Rizzo* too broadly. We hold here that there is no application of *Rizzo v. Good* to this situation involving an individual policeman in a small borough police force in a small municipality in Allegheny County with a population of 5,000 which would prevent this court from vindicating the rights of citizens against conduct such as has been shown in this case.

(2) The Parens Patriae Question.

The defendants soon after this action was brought filed a motion to dismiss claiming that the Commonwealth of Penn-

sylvania had no standing to bring this suit. The court held that the objection as originally filed was well taken but the defect was amendable if individual plaintiffs who had been wronged by the defendants also joined. See memorandum opinion of this court filed February 24, 1978. We will not repeat at length what was said there but merely point out that it was held that there was no showing that the Commonwealth of Pennsylvania had been injured personally by the series of events alleged in the complaint under 42 U.S.C. § 1983 but rather claimed the right to bring the suit as parens patriae on behalf of its citizens. At that time, the court queried whether the Commonwealth of Pennsylvania with all of its courts and authority was not able to obtain sufficient relief in its own tribunals without bringing such a controversy to the federal court. It has since then been determined, however, that the Commonwealth has no ready remedy inasmuch as the provisions of the Borough Code[3] provide for removal of a police officer by Council on complaint from the Mayor but the termination is then reviewable by the Civil Service Commission. In the present case, in view of the fact that the Mayor we find has been instigating and ratifying and confirming what Baranyai has done, the remedy appears to be almost useless, particularly in view of the fact that the Mayor has made only perfunctory investigations when complaints have been brought to his attention. We did hold that the rights of the Commonwealth as parens patriae had been expanded in recent years beginning with the Supreme Court case of *Hawaii v. Standard Oil Company*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed. 184 (1972). The very words "parens patriae" refer to the powers of the English sovereign as father of his country which rights have now vested in the Commonwealth of Pennsylvania since the revolution. It has been held, of course, by the Court of Appeals for this Circuit that the Commonwealth does not have a right to bring an action to redress all injuries received by any of its citizens. See *Common-*

[3] 53 Purdons P.S. § 46121 et seq See § 7 of discussion, infra.

wealth of Pennsylvania v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975), where it was pointed out that the Commonwealth could bring a suit where its own property had been affected or where the general public had suffered an injury so that no one individual had legal standing to sue. *National Association of Flood Insurers* was a property damage case. The instant case is a question of violation of the constitutional rights of the citizens of Pennsylvania and we held that the Commonwealth did have an interest in the violation of such rights which are guaranteed under both federal and state constitutions and which affect the welfare of Pennsylvania citizens. It was previously held by this court that where individual citizens have filed a suit alleging violation of their rights, the Commonwealth had a right to join as an intevening plaintiff. See *Jordan v. Erie School District*, CA 73—34 Erie, reversed and remanded on other grounds, 548 F.2d 117, where unconstitutional actions of the Erie School District were alleged and Commonwealth was permitted to intervene to represent the rights of these citizens as well as others. The right of the state to bring such a suit was recognized in *Commonwealth v. Glickman*, 370 F.Supp. 724 (W.D.Pa.1974, Teitelbaum, J.)

[2] The order of February 24, 1978 indicated that suit should be dismissed unless individual citizens who have been deprived of their rights as set forth in the complaint joined as party plaintiffs in this action with 20 days. Such persons did join, viz: the individual plaintiffs Richard W. Baumann, Joseph Blume, James Mages and Bernard W. Peitz, Jr., individually and on behalf of all others similarly situated. While the court did not certify a class action, it was held that the case was one in effect in view representing the rights of all of its citizens and we are treating this case in such light. We, therefore, hold that the action is properly brought by the constitutional rights of its citizens and to support those individuals who have specifically joined alleging individual grievances.

While the complaint of Baumann has not been sustained, certain complaints of the other individual plaintiffs have been. The court holds that this is sufficient for this purpose and to establish a case or controversy under Article III of the Constitution since we find these persons have reasonable grounds to apprehend further mistreatment in the future.

(3) Statute of Limitations.

This suit was filed October 5, 1977. The defendant Baranyai has throughout the trial objected to evidence of any events back of the one or two year period preceding the bringing of suit claiming that such evidence should not be permitted under the statute of limitations. It should be sufficient answer that such evidence is admissible under Rule 404(b) to show motives, intent, preparation, purpose, knowledge or absence of mistake or accident and to show plan or design. It is also admissible under Rule 406 to show a pattern or routine practice of a defendant or organization.

The Court of Appeals for this Circuit in *Polite v. Deihl,* 507 F.2d 119 (3rd Cir. 1974) has held that since there is no federal statute of limitations under the Civil Rights Act, the state statute of limitations applies and in this area you have to separate an incident into its various components, thus the Pennsylvania statute of limitations for false arrest and malicious prosecution is one year. 12 P.S. § 51 (now repealed). This includes incidental assaults and batteries in connection with the false arrest but does not include beatings occurring after the arrest. As to these, the two year statute of limitations for personal injuries or for assaults and batteries themselves and false imprisonment is applicable. 12 P.S. § 34, 12 P.S. § 31. See also *Ammlung v. City of Chester,* 494 F.2d 811 (3d Cir. 1974).

In the instant case, the only incidents as to which these statutes of limitations might apply are No. 11 Margaret Blume, false arrest November 6, 1974. No. 12 James Mages, assault

and battery November 16, 1974, and Richard Stefanick, assault and battery, July 10, 1975. All the other incidents from No. 13 forward are within the appropriate period of limitations.

[3] It should be emphasized again that this is not a suit for damages resulting from assaults and batteries and false arrests. If we were faced with the task of awarding damages for these instances, we would, of course, hold that Nos. 11, 12 and 13 were time-barred by the Pennsylvania statute of limitations, but otherwise we hold that they are admissible for the purposes above set forth. It has been so held in similar cases. *Williams v. Anderson,* 562 F.2d 1081 (8th Cir. 1977); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Hazelwood School District v. U. S.*, 443 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). As noted in Footnote # 15 of Hazelwood, this would be particularly true where the relevant aspects of the decision making process have undergone little change and such is the case here where the attitude and actions of the defendants have been the same down through the years 1974 to date. Such evidence is particularly appropriate in a case like this where we have a difficult problem in fashioning appropriate relief and we must therefore consider even time-barred incidents not too remote for the purpose of establishing a pattern of conduct which has not to this moment in time been abated.

(4) Warrantless Entry Into Private Dwelling for Making of Arrests and Search

The so-called Nist incident is recounted in Finding of Fact No. 29 in general but merits a somewhat fuller discussion. In this case, defendant Baranyai with some other Millvale Officers were called to support the police in Reserve Township, an adjoining municipality. This was under a backup or assist arrangement between various municipalities in that area. As noted, the Reserve Township Police had received information

over the radio about a telephone call from an unknown informant saying that a party and disturbance were going on at the residence of Katy M. and John J. Nist (Katy was the mother) in Reserve Township. The information from an unknown informant was obviously insufficient to justify the issuance of a warrant and when the police arrived, no noise or disturbance was audible on the sidewalk or in the neighborhood and so there were insufficient grounds to justify entry since no disturbance was apparent and there were no neighbors in the immediate vicinity who were complaining. John J. Nist met the officers in front of the house and when questioned, he said that there was a party or get together going on. Baranyai and the Reserve Township Officer said we are going in to inspect. Nist replied that they have to have a warrant and demanded a warrant. Baranyai told Nist that he did not need a warrant. It appears that Baranyai was the first in the house and he proceeded to ransack the purse and other belongings of Mrs. Katy Nist who was upstairs watching television and also he conducted a search of the rest of the house. According to his story, he was looking for one of the persons at the party who had run upstairs. In this he was justified if his entry was legal, but he was not justified in making detailed searches of the purse and the belongings of Mrs. Nist in looking for the escapee. (The escapee was found lurking under a bed on the second floor.)

[4] The court holds that under these circumstances, there was no justification for entering the house. The court is aware that *Payton v. New York*, is presently before the U.S. Supreme Court, No. 78-5420, on reargument but the case is not dispositive. See summary of the argument in *Payton* before the U.S. Supreme Court at 48 U.S. Law Week 3267. In that case the New York Court of Appeals had split four to three holding that an entry to arrest a felon did not require a warrant. The Court of Appeals for the 8th Circuit, however, more recently in *U. S. v. Houle*, 603 F.2d 1297 (8th Cir. Aug. 17, 1979) has held flatly, following *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct.

2022, 29 L.Ed.2d 564, that a warrantless entry into a private home whether to make an arrest or to make a search, both of which occurred in this case, is per se unreasonable in the absence of a number of well defined "exigent circumstances". In the instant case, the officers made no attempt to secure a warrant and under the information at their disposal could not have secured a valid warrant. There were no exigent circumstances such as hot pursuit or a public disturbance which would have justified entry without a warrant, whether to arrest or to search, both of which occurred here. We, therefore, hold that the entry into the Nist house was unlawful, the search was unlawful and that they should be considered as another one of the incidents involving Baranyai since he acted as a lender albeit he had been called by the Reserve Township Police.

[5] Underage drinking is a summary offense governed by Pa.R.Cr.P. 51 formerly 102. A warrantless arrest is only justified where there is breach of the peace which endangers the property or safety of any person present. *Commonwealth v. Shillingford,* 231 Pa.Super. 407, 332 A.2d 824 (1975). This apparently has not filtered through to the Millvale Police Department, particularly Baranyai who tends to regard this offense as a heinous felony under the evidence in this case.

(5) Baranyai Is Subject to Equitable Relief Against Further Violation of Citizens' Civil and Constitutional Rights.

[6-8] As has been shown in the findings, the defendant Baranyai has on numerous occasions been guilty of the use of excessive force or unreasonable force in making an arrest. In many instances where we have found the arrest justified, he has been guilty of extreme assaults upon prisoners after they are lawfully in custody at a police station so the application of force is no longer necessary. This court holds that this gives rise to a cause of action under 42 U.S.C. § 1983 and subjects him to equitable relief. See *Curtis v. Everett,* 489 F.2d 516 (3d Cir.

1973); *Polite v. Deihl*, 507 F.2d 119 (3d Cir. 1974); *Howell v. Cataldi*, 464 F.2d 272. As the court held in *Howell v. Cataldi*, supra, where the application of force by a police officer exceeds that which is reasonable and necessary under the circumstances and also violates standards of decency more or less universally accepted, it amounts to cruel and unusual punishment. Where lights blows are administered, they might be considered a mere tort under state law and not subject to suit under 42 U.S.C. § 1983. But here, this conduct and the manner of administering it grades into cruel and unusual punishment under *Ingraham v. Wright*, supra.

It has further been held that making of an arrest without probable cause is a constitutional violation under § 1983. See *Patzig v. O'Neil*, 577 F.2d 841 (3d Cir. 1978). We hold that plaintiffs are entitled to equitable relief against Baranyai's conduct in this respect which is likely to be repeated in the future.

The likelihood of repetition in the future is borne out by the fact that in two of these incidents, the witnesses testified they were afraid to come into Millvale for fear of arrest and Baranyai, himself, under cross examination admitted that he was accustomed to telling people to get out of Millvale and stay out or they would be arrested. When questioned by the court as to his right to inflict these people on other municipalities, his reply was that he had authority to do this and they should go back where they belong.

[9, 10] A sentence of outlawry is certainly not authorized for even a trial court of general jurisdiction. See summary of the law in this respect recently in *Rutherford v. Blakenship*, 468 F.Supp. 1357 (W.D. Va. 1979) where there is a review of the background of orders of outlawry and banishment. Banishment was a part of the penalties inflicted under English law before and immediately after the Revolution but has never been permitted in this country. As the court well says "To

permit one state to dump its convict criminals into another is not in the interest of safety and welfare; therefore the punishment by banishment to another state is prohibited by public policy." See also *Dear Wing Jung v. U.S.* 312 F.2d 73 (9th Cir. 1962); *People v. Baum*, 251 Mich. 187, 231 N.W. 95 (1930). In this particular case, there is no authority in law for an individual policeman to take it upon himself to determine which person should be subject to a de facto sentence of banishment. We hold in this respect there is a violation of the constitutional rights of U.S. citizens to move freely within the confines of this country.

(6) The Anti-Loitering Ordinance of the Borough of Millvale.

The Borough of Millvale has an ordinance governing disorderly conduct and loitering, Ordinance No. 305 adopted January 3, 1911. Insofar as we are concerned in this case only sections Q and R are involved. The definition of disorderly conduct contained in this ordinance (see joint Ex. B) provides:

> "Q. All persons persisting in loitering upon the public highway or streetcorners and in front of any stores, shops, places of business, place of amusement or place of worship after being requested to vacate such place or places and move on.
> "R. All habitual street or corner loafers."

The court appreciates that the Borough of Millvale like a number of other municipalities in Pennsylvania has a problem with gangs or groups of persons congregating in front of various stores or on street corners so as to block the passageways and to some extent terrorize older citizens. These situations, however can be dealt with under other laws without applying the vague provisions of ordinance No. 305.

The defendant Baranyai particularly uses this ordinance to justify his conduct in falsely arresting a number of the complaints in this case, to wit: Margaret Blume, Kimberly

Urbanek, Gilbert Gruemken and Jack Dorn who were simply standing on a sidewalk doing nothing, blocking no one and creating no hazard. As the court remarked at one point early in the trial, it appears to be a criminal offense to Millvale subjecting one to arrest merely to stand upon a sidewalk. As stated, we recognize that municipalities have a legitimate concern in avoiding obstructions of sidewalks and public passages but it is believed that the state law (18 Pa.C.S.A. § 5507) furnishes sufficient basis for handling this problem by the police without resorting to false arrest and other violations of the federal constitution.[4]

It will be noted that the state law covers offenses by a person who having no legal privilege to do so intentionally obstructs a highway, sidewalk or other public passage. The final sentence of subsection (a) gives protection to the right of free speech which does not appear to be concerned in any of the incidents before us. The word obstruct is so defined in subsection (c) as to mean rendering impassable without unreasonable inconvenience or hazard and subsection (b) prevents abuse of

[4] 18 CPSA § 5507. Obstructing highways and other public passages.

(a) Obstructing.—A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such gathering.

(b) Refusal to move on.—

(1) A person in a gathering commits a summary offense if he refuses to obey a reasonable official request or order to move: (i) to prevent obstruction of a highway or other public passage; or (ii) to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

(2) An order to move addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the site or location of the gathering.

(c) Definition.—As used in this section the word "obstructs" means renders impassable without unreasonable inconvenience or hazard.

the words "refusal to move on" in that there must be a reasonable official request or order to move to prevent obstruction of a highway or other public passage or to maintain public safety. In the instances before us as above recited in this case, no one of these elements were present. It appears that these citizens were simply present on a sidewalk doing nothing, blocking no one and creating no hazard and yet the ordinance was distorted by Baranyai to cover their arrests and removal to the police station without statement of any reason being given for the same. The court finds that this is going too far under the decisions of the U.S. Supreme Court. See *Brown v. Texas*, ___ U.S. ___, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (requiring a citizen upon request by the police to identify himself was unconstitutional applies where the officers lacked any reasonable suspicion to believe that the person was engaged or had engaged in criminal conduct). It was stated that seizure of a person under such circumstances must be based on specific objective facts indicating that society's legitimate interests require the seizure of the particular individual and it was held that in such a case the right to personal security and privacy tilts in favor of freedom from police interference. We find the same situation to exist here.

In *Shuttlesworth v. Brimingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), the court was confronted with an ordinance similar to that of Millvale's but which had been construed by the Alabama courts to cover only cases of obstructing passage and where there was obstruction the defendant refused to move on after request by an officer. In none of the cases before us did this fact exist, but the officer took the ordinance literally to support the arrest of a person who was merely standing on the sidewalk obstructing no one. See also *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

With respect to good faith on the part of the officer in making these arrests, the court finds it is difficult to believe

since it was shown the other officers of the police department did not enforce this ordinance in this manner. Rather, it was used by Baranyai to arrest people he did not like or to arrest people for no reason at all either to show his authority or in some way to deter others. However this may be and assuming that Baranyai was acting in good faith in enforcing this ordinance at the behest of his superiors the Chief and the Mayor, who instructed him and other policemen to use the ordinance to break up street corner gangs, this would not amount to a defense against equitable relief sought by the plaintiffs where the evidence shows that he had continued and the inference is he intends to continue such a course of conduct. No one is seeking damages from him for making these arrests in the past. What the court is asked to do is restrain such arrests which have no basis in law in the future. See *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566, where the court said: "Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers. But '[w]e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied.' ... Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate." *Michigan v. De Fillippo*, ___ U.S. ___, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) does not apply here. That case involved suppression of evidence obtained in the course of an arrest under an ordinance later held invalid.

Again, in *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977), the court held that the qualified immunity for public officials enunciated in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) applies only to damages not to equitable relief.

Under these circumstances, it is not necessary to make a formal holding of vagueness or overbreadth with respect to this

ordinance. All we hold is that as construed and applied by Officer Baranyai, it has resulted in false and baseless arrests of various citizens.

[11] It should be noted that he believes that any citizen is subject to the whim of an individual officer and may be required to move or be placed in a police car. This is intolerable. Only if limited to clearing substantial obstructions is it reasonable. *Washington Mobilization Committee v. Cullinane*, 184 U.S.App.D.C. 215, 566 F.2d 107 (D.C. Cir. 1977).

(7) Parties Subject to Injunctive Relief.

The court has previously held that Officer Baranyai himself is subject to equitable relief the exact nature of which will be determined hereafter in this opinion and the order accompanying the same. The court also holds that the other defendants, viz: Chief of Police Porter, Mayor McCarthy and the Borough Council of Millvale are also subject to injunctive relief in this court so as to protect the rights of United States citizens in the future.

Before proceeding further, we should consider the legal setting in which the police department of a Pennsylvania Borough such as Millvale functions. The basic section of the Pennsylvania Borough Code dealing with this matter is 53 P.S. § 46121 as amended by Act February 1, 1966, P.L. (1965) 1656, No. 581, § 1121.[5]

[5] "§ 46121. Appointment, suspension reduction, discharge, powers; mayor to have control. Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint and remove, or suspend or reduce in rank, one or more suitable persons, citizens of the United States of America, as borough policemen, who shall be ex officio constables of the borough, and shall and may, within the borough or upon property owned or controlled by the borough or by a municipal authority of the borough whether such property is within or outside the limits of the borough, without warrant and upon view, arrest, and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any

(continued)

Under this, it will be noted that the borough council has the right to appoint and remove or suspend or reduce in rank borough policemen and may designate one of the policemen as chief of police (in this case defendant Porter). It is further provided in the second paragraph that the mayor shall have full charge and control of the chief of police and police force and has the right to direct the time, place and manner in which they shall perform their duties.

In 53 P.S. § 46124[6] it is provided that the mayor also may suspend policemen without cause until the next succeeding

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unlawful act tending to imperil the personal security or endanger the property of the citizens, or for violating any ordinance of the borough for the violation of which a fine or penalty is imposed, and notwithstanding any statute pertaining to the same or similar offenses. Any person so arrested shall be received for confinement by the keepers of the jails, lockups, or station houses within the county.

The borough council may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

* * * * * *

The borough may, by ordinance, establish a police department consisting of chief, captain, lieutenant, sergeants, or any other classification desired by the council, and council may, subject to the civil service provisions of this act, if they be in effect at the time, designate the individuals assigned to each office, but the mayor shall continue to direct the manner in which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the chief of police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties. The mayor may appoint special policemen during an emergency in which the safety and welfare of the borough and the public is endangered and auxiliary policemen may be appointed as provided by general law."

[6] "§ 46124. Suspension by mayor.

In addition to the powers of council to suspend policemen, the mayor may, for cause and without pay, suspend any policemen until the succeeding regular meeting of the council, at which time or thereafter the council may, subject to the civil service provisions of this act, if they be in effect at the time,

(continued)

regular meetings of the council at which time the council may take action as to suspensions, discharges, etc.

Provision is also made in 53 P.S. § 46190 for specific grounds for removal or reduction in rank of a policeman and in § 46191 provision is made for his right to demand a hearing before the civil service commission. It appears that in the case of the Borough of Millvale there is a civil service commission operating and if suspended by Borough Council, Baranyai would have a right to a hearing before the commission and then to take a further appeal to the Court of Common Pleas and thence up through the courts. It would seem obvious that in connection with its powers to suspend or remove a policeman the borough council would have the right to conduct such investigations or hearings as they deem proper and also it is noted under 53 P.S. § 46029(3) the mayor has a duty to report on the state of the borough to the council which would seem to indicate all matters pertaining to borough welfare such as misconduct by the police force. The Commonwealth is correct in claiming that procedures under Pennsylvania law are so cumbersome and ineffectual in a civil rights case as to leave citizens without adequate remedy at law.

[12] In the instant case, we hold that the Chief of Police, the Mayor and the Borough Council have all been so deeply involved in the misconduct of Officer Baranyai as heretofore determined that they are subject to injunctive relief in an attempt to remedy the situation.

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suspend, discharge, reduce in rank or reinstate with pay, such policemen: Provided, however, That a policeman suspended by the mayor may not be reinstated by council at a date earlier than ten working days from the date fixed by the mayor for the suspension to commence. In any case where the council has reinstated a policeman, after having been suspended by the mayor, the mayor shall not thereafter suspend such policeman for reasons arising from the same act for which the first suspension was made, or for reasons that the council, in reinstating such policeman, shall have determined not to be grounds for suspension."

(A) Chief of Police Porter.

The evidence indicates that despite complaints Porter never found fault with Baranyai pertaining to the charges. He took no action to discipline him after he was convicted in criminal court of malfeasance in office, he has publicly supported Baranyai in all instances, he could not give a single instance of a report of an investigation to the complainant, and he retaliated against other officers, viz: Cepek, Fishinger, Pfeiffer and Snyder who testified or otherwise complained relative to Baranyai's conduct. The Chief was also the recipient of a complaint from the district attorney of approaches by policemen and the chief himself to witnesses subpoenaed to testify at the Baranyai hearing in his criminal trial in common pleas court in an endeavor to influence the testimony of such witnesses in Baranyai's favor.

(B) Mayor Regis McCarthy.

The evidence in the case is that Mayor McCarthy instigated the police department in using broad powers under Ordinance No. 305 of 1911 to move people off the street who were doing nothing and not obstructing passage and to arrest them upon failure to move at the officer's whim. As is well stated by the defendant the law is that to hold persons subject to relief in this court there must be a showing of actual knowledge, participation, ratification and aiding and abetting. The mere passive sitting by and doing nothing is no grounds for granting relief. See *Walker v. University of Pittsburgh*, 457 F.Supp. 1000 (W.D.Pa. 1978); *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D. Pa. 1977). Mayor McCarthy was in receipt of numerous complaints relative to Baranyai's conduct both in and outside council meetings but he found that all complaints were unjustified. Mayor McCarthy told council he would investigate and report back but in most cases no report was made. Any investigation made was, as previously found by this court, perfunctory in nature only and consisted of asking

Chief Porter or Officer Baranyai whether there was any basis for the complaint.

Mayor McCarthy has publicly stated that: "As long as I am Mayor, I will not suspend Frank Baranyai from the Millvale Police Force." He also participated in the retaliation against other officers who testified or complained relative to Baranyai. We therefore find that he is causally linked to this pervasive pattern of violation of constitutional rights and is subject to relief under *Rizzo v. Good*, supra, that he is causally linked to police abuse and that practices in this case certainly rise to a custom or usage which is actionable under 42 U.S.C. § 1983. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1957). It should be further emphasized again that we are not in this case being asked to hold these defendants liable for damages but only to grant injunctive relief to prevent further deprivation of the rights of citizens while in Millvale.

(C) The Borough Council.

With respect to Borough Council the evidence shows that citizens soon learned that complaints to the Borough Council were useless. The Borough Council itself has, however, taken an active part in the Baranyai affair. It twice adopted resolutions supporting Baranyai's conduct on July 12, 1977, (Plaintiff's Ex. 15) and on February 14, 1978, (Plaintiff's Ex. 12).

Notwithstanding that Baranyai was convicted on criminal charges against him and this case was filed October 5, 1977, detailing the complaints against him, the Borough Council has nevertheless refused to take futher action. Two members of the Borough Council who endeavored to induce it to do something about the situation and exercise its powers were voted down by a vote of 5 to 2 and were subject to personal abuse.

It has been held that if local authorities fail in their duties then judicial authority may be invoked. See *Swann v. Char-*

lotte Mecklenburg School District, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) dealing with prison conditions subject to an administrative injunction to prevent further violation of constitutional rights of inmates when the court has exercised patience in the past in approaching the problem.

Beginning in 1975, the Borough Council began to get complaints about the conduct of Officer Baranyai and notwithstanding the verdict of guilty in the criminal cases and the bringing of this suit has failed to make any investigation or take any steps towards removing or suspending him. This is not a case like *Rizzo* depending on statistical proof. The proof here pinpoints violations by one police officer against individual citizens who have appeared on the stand and complained. The police officer is a defendant here as well as the other borough officials who are involved in this unhappy proceeding and whose actions have encouraged Baranyai in further violations. For what reason there has been this unusual extension of favors and encouragement to Baranyai, the court cannot determine but we do determine that it has existed and the court does not believe that in such a situation the requirements of the federal constitution can go on being ignored and with the equitable relief provided for under the Civil Rights Act, 42 U.S.C. § 1983 denied. This is an extreme case but something must be done to protect citizens. We find this course of conduct on the part of Baranyai encouraged and supported by the other defendants in this case will continue unless some restraint is exercised by the court.

It is also noted that testimony indicates that defendants Porter and Baranyai believe that there is a widespread conspiracy against them by the Mafia, by Civil Rights organizations and by the Pennsylvania Department of Justice and that questioning of Baranyai's conduct is improper and illegal. What this indicates with respect to Baranyai's thinking, we cannot at this time determine. Defendant Porter has attempted to retal-

iate against and harass and intimidate the Pennsylvania Department of Justice for taking up the cudgels in favor of citizens in this case. The deputy attorney general filing this suit was shortly thereafter arrested for harassment and an attempt has been made to get the Pennsylvania Attorney General to disband the community advocate unit. Under these circumstances, we have no hesitation in finding that all the defendants in this case were causally linked to the police abuse by Officer Baranyai, that there was a pervasive pattern of support for him and his misconduct and this amounts to a custom and usage under 42 U.S.C. § 1983 and *Monell*, supra. As was explicated by our Court of Appeals in *Lewis v. Hyland*, 554 F.2d 93 (3d Cir. 1977) with respect to *Rizzo*, *Rizzo* does allow limited federal intervention into state police practices in those instances where it could be found that a pervasive pattern or policy of unconstitutional behavior was causally related to the named official defendants. We so find in this case. See also *Santiago v. Philadelphia*, supra.

We are not at this moment in this case particularly concerned with the question of imposing the federal courts upon the operations of the state of Pennsylvania or its municipalities by granting of equitable relief because, as noted, the Commonwealth of Pennsylvania is one of the plaintiffs here and is specifically asking for such intervention. We are still, of course, mindful of the delicacy of adjustments between federal equitable power and the administration of the affairs of this borough by elected officials. But when the State of Pennsylvania confesses it has no handy remedy to prevent the abuse of citizens as shown in this case from continuing certainly the federal courts have a right to vindicate the federal constitution.

(8) Remedies.

As has been pointed out in *Swann v. Charlotte Mecklenburg Board of Education*, supra, and *Monell*, supra, the court

has wide discretion in determining appropriate remedies to be employed in a situation such as exists here.

We are cautioned, of course, by the Court of Appeals for this Circuit in *Lewis v. Hyland,* supra, involving a proposed injunction against the New Jersey State Police where the lower court did find a pattern and practice of constitutional violations by individual policemen but could not find that there was joinder in such acts by supervisory officials, *Rizzo,* supra, is a roadblock of formidable dimensions. The court in *Lewis v. Hyland,* supra, however, did find that where a plan or practice was found which is a causal link to the individual officer's conduct, relief may be granted. We have so found in this case and hold that this case goes far beyond the mere failure to act as in *Rizzo.* Rather, it falls within the pattern of *Allee v. Medrano,* supra, and *Hague v. CIO,* 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

As we have noted previously, much of *Rizzo* appears to be based upon the delicate balance between federal and state authority in our system of federalized government in this country and a desire not to intrude upon the day-to-day operations of a large metropolitan police force.

We have some precedent in the decision of Judge Snyder of this court in *Wecht v. Marstellar,* 363 F.Supp. 1183 (W.D. Pa. 1973) where a Pittsburgh City motorcycle policeman had engaged in a course of illegal and unconstitutional conduct using wrongful and excessive force and the evidence disclosed a pattern that violated the constitutional rights of users of the sidewalks and streets of the City of Pittsburgh. An injunction was issued prohibiting the defendant from engaging in certain specific types of acts.

In the case at bar we find that for Officer Baranyai to continue to act as a policeman upon the streets of Millvale will only lead to further disruptions and violations of constitu-

tional rights and that some injunction is necessary to protect the citizens from continuing future happenings of this kind.

We are admonished as heretofore noted by the decision of the U.S. Supreme Court in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 28 L.Ed. 2d 554 (1978) to exercise patience in cases of this kind and not to intrude the federal court into day-to-day management of a penal institution except as a last report. As expressed by Judge Snyder in *Wecht v. Marstellar*, supra, the deprivations of the constitutional rights of citizens must be stopped but there should be no unnecessary encroachment on state and local government functions. Equitable relief in such circumstances must be specifically tailored to fit the events of a particular case. *Schweiker v. Gordon*, 442 F.Supp. 1134 (E.D. Pa. 1977).

In assessing the interference of this court in state and municipal governments, we must remember that 42 U.S.C. § 1983 was enacted under the Fifth Section of the Fourteenth Amendment as appropriate legislation to carry out its purpose and we cannot permit the salutory purpose of § 1983 and the Fourteenth Amendment to be sidetracked by fear of undue interference with state and municipal governments, particularly where, as here, the Commonwealth of Pennsylvania is asking this court to protect its citizens from the depredations of this one individual and those acting in concert with him. We hold that the injunctive relief herein provided will not interfere unduly with the daily internal workings of the Millvale Police Department in accordance with the teachings of *Rizzo*. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1975).

(D) Conclusions of Law.

(1) This court has jurisdiction over this action and these defendants.

(2) Local law enforcement officials who act under color of state law and who use excessive force or who make illegal

arrests or who otherwise deny citizens their constitutional rights are subject to the equity powers of this court under 42 U.S.C. § 1983. Defendants, under color of state law, have engaged in a course of illegal and unconstitutional conduct by using wrongful and excessive physical force on numerous occasions, making illegal arrests, conducting illegal searches, by intimidating and harassing citizens, and by retaliating against those who would complain of such illegal and unconstitutional conduct.

(3) The actions of defendants were directed against various citizens, some of whom were in the custody and control of defendant Baranyai and some of whom were otherwise lawfully upon the streets and sidewalks of the Borough of Millvale.

(4) The deprivation of constitutional rights of the plaintiffs and the persons they represent constitutes irreparable harm for which they are entitled to equitable relief.

(5) Plaintiffs do not have an adequate remedy at law.

(6) Injunctive relief is essential to prevent defendants from continuing to deprive plaintiffs and the individuals they represent of their constitutional rights.

(7) The evidence in this case shows a pervasive pattern of participation, affirmance, encouragement and aiding and abetting of the unlawful conduct of Baranyai by the other defendants.

(8) It is clear that the unlawful conduct of defendants in violating the constitutional rights of plaintiffs and the individuals they represent may recur unless enjoined.

(9) On the basis of the evidence as presented in this case which shows a continued course of conduct on the part of defendants, which course of conduct violates the constitutional rights of the plaintiffs and those individuals they represent, it is the conclusion of this court that a permanent injunction should

issue against defendants enjoining them as set forth in the order accompanying this opinion.

We reserve for future determination the rights, if any, of plaintiff's attorneys to counsel fees and expenses. The attorneys for the plaintiff, if they intend to seek such counsel fees and expenses, are directed to file appropriate petitions for the same with details of time spent as required by the cases in the Court of Appeals of this Circuit within 20 days from the date of this opinion.

Opposition

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No. 81-465

In the Supreme Court of the United States

October Term, 1981

JAMES D. PORTER, FRANK L. BARANYAI and REGIS J. McCARTHY,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA and RICHARD W. BAUMANN, JOSEPH BLUME, JAMES MAGES and BERNARD W. PEITZ, JR., Individually and on Behalf of All Others Similarly Situated,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the Commonwealth of Pennsylvania has standing as *parens patriae* to institute an action for injunctive relief under 42 U.S.C. §1983 to protect its quasi-sovereign interests in preventing violation of constitutional rights of its citizens by law enforcement and municipal officials.

II. Whether the injunction against Petitioners constituted an unwarranted intrusion by the Federal Judiciary into the internal affairs of the police department in violation of the standards of *Rizzo v. Goode* and was overly broad and inappropriate.

III. Whether this action has been rendered moot by the resignation from the Borough of Millvale of the law enforcement officer who has been found to have been engaged in a pattern or practice of constitutional violations and reemployment as a law enforcement officer in another municipality within Pennsylvania.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Rule 22 of the Rules of the Supreme Court of the United States, Respondents submit this Brief in Opposition to the Petitioners' Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit en banc (Petitioners' App. A) is reported at F.2d (3d Cir. 1981); the panel Opinion of the United States Court of Appeals for the Third Circuit (Petitioners' App. B) was published in the advance sheets at 642 F.2d 687 and was vacated and withdrawn from the bound volume at the request of the Court; and the Opinion of the District Court (Petitioners' App. C and Supp. App.) is reported at 480 F. Supp. 686 (W.D. Pa. 1979).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

ADDITIONAL STATUTE INVOLVED

In addition to 42 U.S.C. §1983 already set forth in the Petition for Writ of Certiorari (Petition, p. 5), this case also involves 42 U.S.C. §1988:

> 42 U.S.C. §1988. Proceedings in vindication of civil rights
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania instituted this action solely for injunctive relief under 42 U.S.C. §1983 and the Fourteenth Amendment. It was filed on October 5, 1977 and sought to permanently enjoin Police Officer Frank L. Baranyai, Chief of Police James D. Porter, Mayor Regis J. McCarthy and members of Council of the Borough of Millvale, Allegheny County, Pennsylvania, from subjecting residents of Millvale and other citizens of Pennsylvania to a continuing course of unconstitutional police conduct.

The Commonwealth's complaint averred 31 separate instances of unconstitutional conduct by Officer Baranyai. The Commonwealth also averred Chief Porter, Mayor McCarthy and members of Council were aware of, condoned, and approved this conduct, including threatening and intimidating citizens and other police officers who would complain or testify against Officer Baranyai.

The Commonwealth filed suit in its sovereign capacity as *parens patriae* through its Attorney General as chief law officer of the Commonwealth, charged with the enforcement of the Constitution and laws of the United States, as well as with the enforcement of the Constitution and laws of the Commonwealth of Pennsylvania.

On February 24, 1978, the District Court denied defendants' (Petitioners herein) motion to dismiss, provided that individuals who suffered deprivation of their constitutional rights join as parties plaintiff in the action. An

amended complant was filed on March 24, 1978, wherein the four individuals named as plaintiffs were joined as individual plaintiffs.

Motions to strike the amended complaint were filed and, on May 2, 1978, the District Court denied the motions, stating, among other things, that it was not necessary for all individual citizens who may have suffered constitutional deprivation to join as parties plaintiff. Rather, it was sufficient to have one or more individual citizens who have been deprived of their constitutional rights to join as plaintiffs.

On June 22, 1978, a motion was filed by the individually named plaintiffs, i.e., Baumann, Blume, Mages and Peitz, seeking to have the action certified as a class action.

On September 6, 1978, the District Court denied the motion for class action "for the reason that the Commonwealth of Pennsylvania as *parens patriae* was representing the citizens of the state generally in this action and, if there was any further need for a class action which may later appear in the case, the matter would be reconsidered at that time."

The action was tried from April 23, 1979 through May 10, 1979 and August 21 and 22, 1979.

On November 16, 1979, the District Court issued its opinion and order. It held that the Commonwealth had *parens patriae* standing in this action. The Court found that Officer Baranyai had engaged in a long continuing pattern and practice of denying citizens their rights to be free from physical violence, mistreatment, threats, harassment, illegal detention, illegal arrests and illegal searches

and seizures. The Court found that Chief Porter and Mayor McCarthy had actively supported and encouraged Officer Baranyai, retaliated against citizens and police officers who complained against the officer's conduct, and failed to investigate complaints of his misconduct. Borough Council was found to be actively involved by publicly supporting Officer Baranyai and refusing to take any action against him for his misconduct. The Court ordered that Officer Baranyai cease his unconstitutional conduct and be assigned to desk duty, and the municipal officials were enjoined from their aid, support and encouragement of his misconduct and retaliation, harassment and intimidation against plaintiffs and other complainants.

After oral argument, a panel of three judges of the Third Circuit Court of Appeals rendered a decision and order on February 19, 1981. The panel held that (1) the Commonwealth was not a proper party plaintiff; (2) the District Court's findings of fact were supported by the record in regard to Officer Baranyai, Chief Porter and Mayor McCarthy; (3) the evidence against the named Borough Council members was insufficient to prove that injunctive relief was appropriate; and, (4) the case was remanded to the District Court to implement its decision, consider the issue of class certification, and to frame an injunctive order on appropriate record.

On February 24, 1981, Officer Baranyai submitted his resignation effective March 15, 1981 to the Borough of Millvale. Thereafter, he assumed a law enforcement position in another Pennsylvania community north of Pittsburgh.

The Commonwealth of Pennsylvania filed a petition for rehearing and suggestion for rehearing en banc on

March 19, 1981. On March 26, 1981, a majority of the active judges voted for rehearing en banc on this appeal and vacated the opinion and judgment filed on February 19, 1981.

On July 30, 1981, after oral argument, the United States Court of Appeals for the Third Circuit en banc affirmed *per curiam* the judgment of the District Court, except as it was directed to members of Borough Council. The opinion of Circuit Judge Gibbons, joined by four judges of the Court, held that the Commonwealth was an appropriate plaintiff in this action seeking to prevent the infliction of constitutional violations under 42 U.S.C. §1983. Under the theory of *parens patriae,* the Court found that the Commonwealth was in this suit advancing significant sovereign interests of its own in the prevention of future violations of constitutional rights of its citizens. Furthermore, the Court found that the Pennsylvania law remedy of *parens patriae* was available in a federal district court proceeding in vindication of civil rights by virtue of §3 of the Civil Rights Act of 1866, 42 U.S.C. §1988. While the Court of Appeals did not find it necessary to rest the recognition of the Commonwealth's standing as a plaintiff on representational standing, the Court found that there was considerable merit to the contention that the Commonwealth was an adequate class representative of the class of persons in Millvale who in the past have been and in the future may be subjected to violations of constitutional rights by Millvale policemen.

The Court of Appeals concluded that the District Court did not err in its judgment and order for injunction involving Officer Baranyai, Chief Porter and Mayor McCarthy. In an opinion written by Circuit Judge Garth, with whom four judges joined on the sole issue of Bor-

ough Council, the Court held that there was insufficient evidence for injunctive relief against the Borough Council. Concerning the effect of Officer Baranyai's resignation from the employment of the Borough of Millvale and his assumption of a job as a law enforcement officer in another Pennsylvania community, the Court held that the case was not moot.

Petitioners filed their Petition for Certiorari on August 28, 1981. This brief is filed on behalf of all respondents in opposition to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Introduction

The United States Court of Appeals for the Third Circuit en banc in this case properly applied the holdings of the United States Supreme Court.

Petitioners' argument appears to generally disagree with the holdings of the District Court and the Court of Appeals en banc which affirmed the District Court in all respects, except as to Borough Council. Their petition fails to demonstrate the need or importance for review by this Court, for they have not offered how the Court of Appeals' opinion is in any way contrary to the holdings of this Court, they have not shown any conflict between the Courts of Appeals on any issue,[1] and they have not demonstrated how these issues are novel or important for this Court to resolve. Therefore, the Petitioners have not set forth a basis for review of these questions by this Court.

Petitioners have raised six questions for review. Properly framed, petitioners' questions can be put in three

[1] The Petitioners imply an internal conflict within the Court of Appeals for the Third Circuit by their argument that the Court en banc did not follow the panel opinion in *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975). To the extent that the present case may be inconsistent, the Court en banc may properly overrule a panel decision. (Petitioners' App. A, p. 22.)

separate categories which this Brief in Opposition addresses.[2]

For the following reasons, this Court should not grant certiorari on any of the issues which Petitioners seek to raise for review.

I. The Commonwealth of Pennsylvania has standing as parens patriae to institute an action for injunctive relief under 42 U.S.C. §1983 to protect its quasi-sovereign interests in preventing violation of constitutional rights of its citizens by law enforcement and municipal officials.

This Court has long recognized the standing of a state to bring an action in the federal courts to protect the general health, comfort and welfare of its citizens. In finding *parens patriae* standing for the Commonwealth of Pennsylvania under 42 U.S.C. §1983 and §1988, in this case involving a severe pattern and practice of police and official misconduct, the Court of Appeals en banc properly and

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[2] In Petitioners' argument, they have raised some insignificant questions for review by this Court. For example, Petitioners claim that the courts erred in admitting evidence beyond the statute of limitations (Petition, p. 17). Clearly, the courts were correct. *Hazelwood School District v. United States*, 433 U.S. 299, 309-10, n. 15 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977); *Williams v. Anderson*, 562 F.2d 1081, 1086, n. 7 (8th Cir. 1977). Even if these three incidents which were considered by the District Court in fashioning its equitable relief, were barred by the statute of limitations, there would still be ample evidence to support the findings to justify the relief ordered by the District Court.

consistently upheld the requirements for *parens patriae* suits as set forth by this Court over many years. Their analysis and conclusion are consistent with other recent Courts of Appeals' decisions affecting *parens patriae* standing.

Petitioners simply allege that the Court of Appeals en banc was wrong in finding *parens patriae* standing for the Commonwealth. They appear to argue that the state was not injured by a pattern and practice of police and municipal misconduct which included constitutional violations, that this injury was not one separate and apart from the claims of the individuals in this case, and that there were not enough people affected by their misconduct.[3] Petitioners have totally misconstrued the holding of the Court of Appeals en banc concerning the Commonwealth's *parens patriae* standing and its significant sovereign interests in this case, along with holdings of this Court on *parens patriae*.[4]

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[3] Pages must be read out of sequence to read any coherence into Petitioners' strained argument. Page 10 should be read after page 12 and before page 13.

[4] Petitioners raise a question for review concerning the representative standing of the Commonwealth for its citizens in this case. The Court en banc found considerable merit in the Commonwealth's standing as a representative of the class of persons who in the past have been and in the future may be subjected to violations of constitutional rights by defendants in this case. But the Court did not find it necessary to rest its recognition of the Commonwealth's standing on that ground, holding that the Commonwealth had *parens patriae* plaintiff status (Petitioners' App. A, pp. 25-26). Indeed, the Court of Appeals could have properly determined that the Commonwealth had representational standing under *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343-344 (1977), so there is no basis for certiorari on this ground either.

This Court has long affirmed the legitimate interests of a state to bring a *parens patriae* suit. In *Hawaii v. Standard Oil Company,* 405 U.S. 251, 257-259 (1972), this Court reviewed the nature of *parens patriae* actions. The protection of the general health, comfort and welfare of the state's inhabitants has been held to give the state a sufficient interest to maintain litigation under *parens patriae* standing. See *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Georgia v. Tennessee Copper Company,* 206 U.S. 230 (1907); *Missouri v. Illinois,* 180 U.S. 208 (1901). The health, comfort and welfare of its citizens, as well as the general economy of the state, is part of the "quasi-sovereign" interest which the state has standing to protect. A "quasi-sovereign" interest must be an interest which exists separate and apart from those injuries suffered individually by the state's citizens. *Pennsylvania v. New Jersey,* 426 U.S. 660, 666 (1976).[5]

The Court of Appeals en banc affirmed that "the Commonwealth is vitally interested in the prevention of lawless exercises of the powers its laws confer upon police officers hired by its subdivisions" (Petitioners' App. A, p. 16). The state has a sovereign interest in compliance with the standard of conduct laid down in the Fourteenth Amendment. The Court properly upheld the significant injuries to the Commonwealth's "quasi-sovereign" interests in this case: (1) police misconduct interferes with proper discharge of statutorily delegated functions to municipalities; (2) misconduct risks undermining public

[5] Petitioners clearly are wrong in their claim that the Commonwealth has no legitimate "quasi-sovereign" interest in protecting its citizens from unconstitutional conduct of law enforcement and municipal officials. They have been unable to cite any inconsistent case on this subject.

confidence in municipalities; (3) patterns or practices of misconduct by local officials interferes with performance of the obligation of executive officers of the state to uphold and enforce those rights; (4) if not corrected, burden of post-event enforcement by investigation and prosecution will divert resources of staff and money of Commonwealth; (5) the Commonwealth is vitally interested in safeguarding the health and physical safety of individuals; and, (6) failure to prevent future occurrences of violations of constitutional rights undermines the fiscal status of the Commonwealth's municipalities by exposing them to liability which can only be satisfied from tax revenues.[6] (Petitioners' App. A, pp. 16-18) In this way, violation of constitutional rights of its citizens and interference in law enforcement and municipal functions injures the state significantly, separate and apart from the injuries received by its citizens.[7]

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[6] This action involves a highly unusual long continuing, pervasive pattern and practice of constitutional violations and official misconduct. Such involvement of law enforcement and municipal officials will rarely occur again. In fact, over the ten years of existence of the Community Advocate Unit of the Attorney General's Office, this is the first federal court case involving police and official misconduct. Therefore, this is not an important federal question which must be resolved by this Court.

[7] Petitioners perhaps allege that the number of individuals injured by their misconduct is relevant to consideration of this *parens patriae* suit involving the Commonwealth versus law enforcement and municipal officials of their state.

Whenever this Court has considered cases involving original jurisdiction or suits between states raising questions of the Eleventh Amendment, this Court has focused on secondary factors after finding a "quasi-sovereign" interest to insure that the state has not volunteered to represent private interests, that the state is not offering claims involving an insignificant number

The Court of Appeals' analysis and holding en banc is consistent with other recent decisions by Courts of Appeals on *parens patriae*. See *Commonwealth of Puerto Rico v. Bramkamp*, 654 F.2d 212 (2d Cir. 1981), *cert. pending* (81-361); *Commonwealth of Puerto Rico v. Snapp*, 632 F.2d 365 (4th Cir. 1980), *cert. pending* (80-1305); *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980); and *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976). As the Court of Appeals correctly stated, states have been granted enforcement of the Fourteenth Amendment under *parens patriae* standing.[8] While each case of *parens patriae* stands on its own specific facts,

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of individuals and that those citizens injured could not more practically obtain relief on their own. *Maryland v. Louisiana*, U.S. , 101 S.Ct. 2114, 2116, n. 18 (1981). On the other hand, the Court has made no inquiry into these factors involving numbers in cases brought by a state against private citizens of another state. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Georgia v. Tennessee Copper Company, supra.* Similarly, quantitative factors do not come into play when the Commonwealth sues its law enforcement and municipal officials. Even if numbers were important in this case, Petitioners' unconstitutional conduct threatened and injured individuals traveling, working, shopping and living in Millvale, a community resting within the heart of a large metropolitan area of several million people.

[8] See *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966), *vacated and remanded on other grounds*, 373 F.2d 771 (3d Cir. 1967) (en banc), *on remand*, 270 F. Supp. 782 (E.D. Pa. 1967), *affirmed*, 392 F.2d 120 (3d Cir. 1968) (en banc), *cert. denied*, 391 U.S. 921 (1968) (Commonwealth suit to desegregate Girard College); *Commonwealth of Pennsylvania v. Flaherty*, 404 F. Supp. 1022 (W.D. Pa. 1975) (suit to redress employment discrimination by city and police officials); and *Commonwealth of Pennsylvania v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974) (suit to redress employment discrimination by city officials).

the Court of Appeals did not err in applying this Court's holdings.

In addition, the Court of Appeals correctly upheld the *parens patriae* standing of the Commonwealth under 42 U.S.C. §1988, since Pennsylvania common law recognizes the availability of *parens patriae* standing.

The Court of Appeals decision en banc was correct and consistent with the holdings of this Court and other Courts of Appeals on the issue of the standing of the Commonwealth of Pennsylvania. Thus, this question need not be reviewed by this Court.

II. The injunction against Petitioners did not constitute an unwarranted intrusion by the federal judiciary into the internal affairs of the police department in violation of the standards of Rizzo v. Goode and was not overly broad and inappropriate.

In affirming that the evidence of Petitioners' unconstitutional conduct warranted the specific injunctive relief granted by the District Court, the Court of Appeals en banc conscientiously and correctly applied the holdings of this Court, including *Rizzo v. Goode*, 423 U.S. 362 (1976). The District Court, Court of Appeals panel and Court of Appeals en banc all correctly determined that constitutional violations have occurred over a period of time by Petitioners, that they are likely to recur and that an injunction restraining such conduct is appropriate.[9]

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[9] The Court of Appeals held that there was insufficient evidence for injunctive relief against members of Borough Council. They are not necessary for the continuance of this action since

Petitioners argue that the injunction violated the "boundaries" set forth in *Rizzo v. Goode, supra,* creating a "conflict with applicable decisions of this Court" (Petition, pp. 15-16). But they fail to explain how this case violates *Rizzo* or other holdings of this Court. They suggest that "no appellate decision has gone to such extremes," although they do not cite any other Court of Appeals decision which is in conflict with the considerations and limitations utilized by this Court in fashioning injunctive relief to prohibit future unconstitutional conduct. It would appear that Petitioners simply dislike the results.

The Court of Appeals found substantial evidence concerning the knowledge, acquiescence, support and encouragement of Officer Baranyai's unconstitutional conduct by Chief Porter and Mayor McCarthy (Petitioners' App. A, pp. 29-33). The Court of Appeals en banc and the Court of Appeals panel found that these municipal officials were so independently responsible for the pervasive pattern and practice of police misconduct as to meet the "affirmative involvement" requirements for liability of supervisory officials under *Rizzo v. Goode,* 423 U.S. 362 (1976).[10]

In *Rizzo,* this Court vacated injunctive relief against municipal officials where the District Court had not found the named officials had played any "affirmative part" in the police abuse proven at trial, 423 U.S. at 377, where

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under Pennsylvania law they are assigned only the power of removal or suspension of policemen. 53 P.S. §46121. The daily supervision, assignment and control over police is shared by the mayor and police chief.

[10] The Petitioners do not specifically deny or question the Court's conclusion of an "affirmative involvement." They contend that the injuction was an intrusion into municipal affairs.

it had found no "policy on the part of the named petitioners to violate the legal rights" of plaintiffs, 423 U.S. at 368, and where there was no proof that the officials either authorized or later approved the offending officers' conduct, 423 U.S. at 371. The Court seemed particularly concerned that the offending officers were not named as parties defendant. Finally, the order entered by the District Court was not narrowly addressed to remedying the conduct of the officers whose misdeeds had been proven, but instead broadly sought to institute a comprehensive program for handling citizen complaints.

Once the affirmative link is established, injunctive relief is appropriate. *Rizzo* does not prevent equitable relief narrowly defined to correct specific unconstitutional conduct involving municipal officials. *Lewis v. Hyland*, 554 F.2d 93, 104 (3d Cir. 1977). The Court of Appeals was "constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' (Citations omitted.)" *Rizzo v. Goode*, 423 U.S. at 378.

Unlike *Rizzo*, the Court of Appeals found that Chief Porter and Mayor McCarthy actively supported Officer Baranyai, retaliated against citizens and police officers who complained about or testified against Officer Baranyai's conduct, and failed to investigate complaints of his misconduct.[11] The Court of Appeals carefully distinguished

[11] This is a case more akin to the degree of official involvement proven and held sufficient for liability of officials to injunctive relief in *Allee v. Medrano*, 416 U.S. 802 (1974), and *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). See, also, *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-91 (1978) (suit for constitutional deprivation pursuant to governmental "custom").

this factual situation from *Rizzo.* Officer Baranyai was a named party and the injunction was narrowly defined to correct his misconduct. The Court's reasoning and conclusions were completely consistent with *Rizzo,* for the problems in *Rizzo* were not encountered in this case.

The Court of Appeals has carefully followed this Court's guidelines governing the fashioning of equitable relief. "Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad. . .", *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). The nature and scope of the remedy "must directly address and relate to the constitutional violation itself" *Milliken v. Bradley,* 433 U.S. 267, 283 (1977). "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' " *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 421 (1977). If state and local authorities fail their affirmative obligation and primary responsibility to cure constitutional violations, judicial authority may be invoked which "is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. at 15 (1971); *Hutto v. Finney,* 437 U.S. 678, 688, n. 9 (1979). "Our prior decisions counsel that in the event of a constitutional violation 'all reasonable methods be available to formulate an effective remedy' (citations omitted), and that every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation.' (Citation omitted)." *Hills v. Gautreaux,* 425 U.S. 284, 298 (1976).

The injunction challenged here meets those standards. It focused on remedying the underlying violations. The scope of relief directly and narrowly aimed at the "condition that offends the constitution," *Swann*, 402 U.S. at 16. The injunction enjoined the unlawful and unconstitutional conduct of one police officer and the municipal officials who countenanced and encouraged it.

The Court of Appeals en banc and the Court of Appeals panel found extensive evidence of Officer Baranyai's unconstitutional conduct in that he "subjected persons to unlawful arrest, unlawful search, unlawful brutalization and assault of persons in confinement, unlawful harassment of persons lawfully on the streets . . . unlawful retaliation against persons who complained about his misconduct including unlawful arrest of such persons, and unlawful orders to persons to stay out of Millvale" warranting injunctive relief (Petitioners' App. A, p. 27). Officer Baranyai was limited to desk duty and enjoined from engaging in similar misconduct.[12] While the injunction restricted Officer Baranyai's parameters as a police officer, it did so because Officer Baranyai had demonstrated his unfitness and inability to perform his police duties in a constitutional manner. Contrary to Petitioners' assertions, limiting him to a desk position did not prohibit him from serving as a police officer, nor did it deprive him of his livelihood. Rather, as the Court of Appeals correctly concluded, the injunction was aimed at preventing the conduct which Officer Baranyai had exhibited.

[12] The relief is valid even with Officer Baranyai's change in employment. Evidence showed that Officer Baranyai's unconstitutional conduct was not limited to the borders of Millvale. Incidents occurred in several other communities. The injunction realistically covered Millvale and "elsewhere."

Other Courts of Appeals have upheld injunctive relief which affects the internal personnel structure and procedures of local government units, including terminations of employment, to remedy constitutional violations. See, e.g., *Commonwealth of Pennsylvania v. O'Neill,* 473 F.2d 1029 (3d Cir. 1973); *Lee v. Macon County Board of Education,* 456 F.2d 1371 (5th Cir. 1972); *Singleton v. Jordan Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), en banc, *rev'd. and remanded on other grounds,* 396 U.S. 290 (1970); and *Lance v. Plummer,* 353 F.2d 585 (5th Cir. 1965). Therefore, the Court of Appeals was consistent with other Courts of Appeals in restricting Officer Baranyai's activities.

The Court of Appeals did not err in upholding this narrowly fashioned injunction to prohibit specific unconstitutional conduct evidenced by Petitioners and was consistent with the holdings of this Court.

III. This action has not been rendered moot by the resignation from the Borough of Millvale of the law enforcement officer who has been found to have engaged in a pattern or practice of constitutional violations and reemployment as a law enforcement officer in another municipality within Pennsylvania.

The Court of Appeals en banc correctly determined that Petitioners had not met their burden in showing that this case was rendered moot by the resignation of Officer Baranyai.

Petitioners have not offered any reasons, either in the supplemental brief to the Court of Appeals en banc[13] or in this Petition, which would satisfy the requirements which this Court has determined are sufficient to dismiss a case on the basis of mootness. The Court of Appeals en banc found that under the circumstances there was no assurance that the violations would not recur and that the pattern and practice had been completely and irrevocably eradicated (Petitioners' App. A, pp. 12-13, 29, 39 and 67). In consideration of this question, the Court of Appeals strictly followed the holdings of the United States Supreme Court.

This Court has held that the test for mootness is a two-prong test requiring the party seeking the determination of mootness to prove (1) "that there is no reasonable expectation that the alleged violation will recur" and that (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. . . . The burden of demonstrating mootness 'is a heavy one.' See *United States v. W. T. Grant Company,* 345 U.S. 629, 632-633 (1953)." *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). The Petitioners must show that it is " 'absolutely clear,' absent the injunction, 'that the alleged wrongful behavior could not reasonably be expected to recur.' " *Vitek v. Jones,* 445 U.S. 480, 487 (1980).

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[13] The Court of Appeals en banc specifically requested supplemental briefs from parties on "the effect, if any, on this case, of Officer Baranyai's resignation from the Millvale Police Force and his acceptance of employment elsewhere. Has Officer Baranyai's resignation now rendered this action moot?" (Letter from Court of Appeals dated March 30, 1981.)

As to Officer Baranyai, the Court of Appeals determined the Petitioners had not satisfied their heavy burden to show that the wrongful behavior could not reasonably be expected to recur. The Court had affirmed the District Court's findings that Officer Baranyai had committed widespread unconstitutional acts of police misconduct, including unlawful arrest, detention, searches and seizures, excessive physical brutality and mistreatment, acts of retaliation, harassment, intimidation and outlawry (Petitioners App. A, pp. 27-29). The Court found that Officer Baranyai's voluntary change of employment did not alleviate the need for injunctive relief as to Officer Baranyai.[14] Voluntary cessation of challenged activity or voluntary action to avoid liability has been consistently held to be an inadequate basis for determination of mootness and has been viewed with great suspicion by this Court. *United States v. W. T. Grant Company, supra; United States v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968).

Both the Court of Appeals en banc and the panel upheld the District Court's conclusions that Chief Porter and Mayor McCarthy were independently responsible for the pervasive pattern and practice of police misconduct in Millvale, so as to meet the "affirmative involvement" requirements for liability under *Rizzo v. Goode, supra.* (See discussion under Section II of this Brief). Under

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[14] The injunction applies to Officer Baranyai in his new law enforcement capacity. Absent the injunction, he may continue his same conduct in another part of Pennsylvania, or Millvale may rehire him. This latter possibility is specifically suggested by a newspaper article of June 18, 1981 in the Pittsburgh Post-Gazette which stated that Officer Baranyai had "recently turned down an offer to return to Millvale."

these circumstances, the Court of Appeals did not err in holding that there was no assurance that the alleged violations would not recur or that the pattern and practice of misconduct has been completely and irrevocably eradicated by Officer Baranyai's resignation.

Petitioners have maintained from the beginning that they have done nothing wrong and claimed that there was a conspiracy involving the Mafia, civil rights organizations, and the Pennsylvania Department of Justice against them (Petitioners' App. C, p. 703). Petitioners' unwillingness to correct the unconstitutional activities and the serious nature of these violations make it likely that Chief Porter and Mayor McCarthy may retaliate against plaintiffs or witnesses or may approve of similar conduct of another police officer. *Campbell v. Magruder*, 580 F.2d 521, 541 (D.C. Cir. 1978).

The Court of Appeals' application of this Court's holdings on mootness is clearly correct and consistent and, therefore, need not be reviewed.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit in this case.

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